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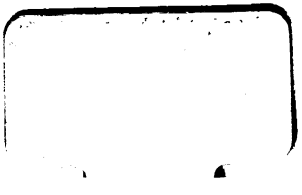
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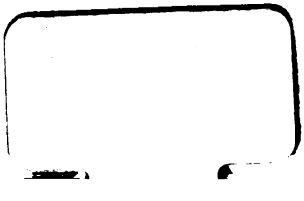
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THE JURIST,

OR

QUARTERLY JOURNAL

OF

JURISPRUDENCE

AND

LEGISLATION.

Qui juris nodos, et legum ænigmata solvat.—*Jus.*

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THE JURIST.

FEBRUARY, 1833.

Art. I.—CORPORATION AND CHURCH PROPERTY.

We intend, in the present article, to enter somewhat minutely into the subject of Foundations and Endowments, and the rights and duties of the Legislature in respect to them: with the design, first, of showing that there is no moral hindrance or bar to the interference of the Legislature with endowments, though it should even extend to a total change in their purposes; and next, of inquiring, in what spirit, and with what reservations, it is incumbent on a virtuous Legislature to exercise this power. As questions of political ethics, and the philosophy of legislation in the abstract, these inquiries are not unworthy of the consideration of thinking minds, nor of a conspicuous place in the pages of a work like the present. But to this country, and at this particular time, they are practical questions; not solely in that more elevated and philosophical sense, in which all questions of right and wrong are emphatically practical questions; but as being the peculiar questions of the present hour: on which to postpone forming an opinion, would be to abdicate the rank of thinking beings, and consent to be driven by the mere force of circumstances. For no one, capable of looking a quarter of a session before him, can help seeing that one of the first and most pressing of the duties which Parliamentary Reform has devolved upon our public men, is that to which we, as public writers, are now about to address ourselves; namely, to decide, what righteously *may*, and, supposing this determined, what *should*, be done with the property of the Church, and of the various Public Corporations.

It is a twofold problem; a question of expediency, and a question of morality: the former complex, and depending upon temporary circumstances; the latter simple, and unchangeable. We are to examine, not merely in what way a certain portion of property may be most usefully employed; that is a subsequent con-

sideration: but, whether we can touch it at all without *spoliation;* whether the diversion of the estates of foundations from the present hands, and from the present purposes, would be disposing of what is justly our own, or *robbing* somebody else of what is his; violating property, endangering all rights, and infringing the first principles of the social union. For the enemies of the interference of the Legislature assert no less. And, if this were so, it would already be an act of immorality even to *discuss* the other question. It is no fit occupation for an honest man, to cast up the probable profits of an act of plunder. If a resumption of endowments belongs to a class of acts which, by universal agreement, ought to be abstained from, whatever may be their consequences; there is no more to be said.

It is under this aspect, then, that we propose first to consider the subject of an interference with foundations. We leave it to others, or perhaps ourselves at another time, to discuss whether existing foundations require to be resumed. What must be first decided, and what we are now about to attempt to decide, is, whether the Legislature is at liberty to entertain the question.

If the inquiry which we have now undertaken were embarrassed with no other difficulties than are inherent in its own nature, it would not detain us long. Unfortunately it is inextricably entangled with the hopes and fears, the attachments and antipathies, of these excited times. All men are either friendly or hostile to the Church of England; all men wish either well or ill to our universities, and our municipal corporations. But we know not why the being biassed by such predilections or aversions, should be more pardonable in a moralist or a legislator, than it would be in a judge. If the dispute were, whether the Duke of Wellington should be called upon to account for £100,000, it would be an infamous perversion of justice to moot the question of the Duke of Wellington's public services, and to decide the cause according as the judge approves, or not, of the war with Bonaparte, or Catholic emancipation. The true question would be, whether the money in the Duke's possession is his or no. We have our opinion, like other people, on the merits or demerits of the clergy, and other holders of endowments. We shall endeavour to forget that we have any. General principles of justice are not to be shaped to suit the form and dimensions of some particular case in which the judge happens to take an interest.

Our assertion with respect to the Church of England, and the trustees of all other national foundations, is, that the funds which they are in charge of are not theirs, but the nation's, and that the nation may justly resume them. But we would rather a hundred times that the property should remain in the present hands, than that it should be taken otherwise than by a high and solemn act

of duty. No use to which it would be possible to convert the endowments would do so much good, as an act of doubtful morality would do harm. The passions which prompt men to seize and take, are never let loose with impunity, and never require to be more tightly curbed than when they are indulged. If there be any one who, in supporting a general resumption of endowments, thinks of the convenience first, and of the justice only second, we have nothing in common with him. It is as much the bounden duty of a nation as of an individual, to exact from itself a survey of the moral bearings of an action, the more deliberate in proportion as it is itself a party concerned, and tempted to the proceeding by other motives than a sense of moral obligation.

If, in the observations we are about to make, we be found wanting in the performance of this duty; if we seek to carry our point not through the conscience of the nation, but through any of the less worthy impulses—let us be disregarded and despised, and let every word we are about to write be as if it were unwritten. But, if we approach the subject with a deep sense of the heavy responsibility of an unjust decision, and seek support to our cause from no motives but those to which an honest man may worthily listen on a question of right and wrong; then may the words which we shall utter in this spirit, obtain from readers imbued with the like, patient hearing and unprejudiced judgment.

1. By a foundation or endowment, is to be understood, money, or money's worth (most commonly land) assigned, in perpetuity or for some long period, for a public purpose: meaning by public, a purpose which, whatever it may *be*, is *not* the personal use and enjoyment of an assignable individual or assignable individuals.

The foundations which exist or have existed, in this or other countries, are exceedingly multifarious. There are schools, and hospitals, supported by assignments of land or money; there are also almshouses, and other charitable institutions of a nature more or less analogous. The estates of monasteries belong to the class of endowments: so do those of our universities; and the lands and tithes of all established churches. The estates of the Corporation of London, of the Fishmongers' and Mercers' Companies, &c. are also public foundations, and differ from the foregoing only in being local, not national. All these masses of property originally belonged to some individual or individuals, or to the State; and were, either by the rightful owner, or by some wrongful possessor, appropriated to the several purposes to which they now, really or in name, continue to be applied.

It might seem most natural to begin by determining, whether the existence of endowments is desirable at all; if this be settled in the affirmative, to inquire on what conditions they should be

suffered to be constituted; and, lastly, how the Legislature ought to deal with them after they are formed. But the problem, what is to be done with existing endowments, is paramount in present importance to the question of prospective legislation. We prefer, therefore, even at the expense of an inversion of the logical order of our propositions, to consider, first, whether it is allowable for the State to change the appropriation of endowments, and, afterwards, what is the limit at which its interference should stop.

2. If endowments are permitted, it is implied as a necessary condition, that the State, for a time at least, shall not intermeddle with them. The property assigned must temporarily be sacred to the purposes to which it was destined by its owners. The founders of the University of London would never have subscribed, nor would Mr. Drummond have established the Oxford Professorship of Political Economy, if they had thought that they were merely raising a sum of money to be placed at the disposal of Parliament, or of the ministry for the time being. Subject to the restrictions which we shall hereafter suggest, the controul of the founder, over the disposition of the property, should, in point of degree, be absolute. But to what extent should it reach in point of time? For how long should this unlimited power of the founder continue?

To this question the answer is so simple and obvious, that we may venture to express a doubt whether it can ever have been missed by any unsophisticated and earnest inquirer. The sacredness of the founder's assignment should continue during his own life, and for such longer period as the foresight of a prudent man may be presumed to reach, and no further. We do not pretend to fix the exact term of years; perhaps there is no necessity for its being accurately fixed; but it evidently should not be a long one. For such a period, it conduces to the ends for which foundations ought to exist, and for which alone they can ever rationally have been intended, that they should remain undisturbed.

All beyond this is to make the dead judges of the exigencies of the living; to erect, not merely the ends, but the means, not merely the speculative opinions, but the practical expedients, of a gone-by age, into an irrevocable law for the present. The wisdom of our ancestors is, we fear, a sorry wisdom, but this is not even following the wisdom of our ancestors; for our ancestors did not bind themselves never to alter what they had once established. Under the guise of fulfilling a bequest, this is making a dead man's intentions for a single day, a rule for subsequent centuries, when we know not whether he himself would have made it a rule, even for the morrow. It is as if one who was an infant when his mother died, should dress himself all his life in a frock

and petticoats, because his mother clothed him in them when he was a baby.

There is no fact in history which posterity will find it more difficult to credit, than that the idea of perpetuity, and that of any of the contrivances of man, should have been coupled together in any sane mind: that it has been believed, nay, clung to as Gospel truth, and has formed part of the creed of whole nations, that a signification of the will of a mere man, ages ago, could impose upon all mankind now and for ever an obligation of obeying him:—that, in the beginning of the nineteenth century, it was not permitted to question this doctrine without opprobrium: though, for hundreds of years before, a solemn condemnation of this very absurdity had been written in the laws, and familiar to every judge by whom, during all that period, they had been administered.

During the last four hundred years or thereabouts, in England and Wales, the power of a landed proprietor to entail his land in favour of a particular line of his descendants has been narrowed to a very moderate term of years after his decease. During the same length of time, it has been laid down as a maxim of the common law, in the sweeping terms in which technical jurisprudence delights, that "the law abhors perpetuities." It is now a considerable number of years since a London merchant having by testament directed that the bulk of his fortune should accumulate for two generations, and then devolve without restriction upon a person specified; this will, rare as such dispositions might be expected to be, excited so much disapprobation, that an Act of Parliament was passed, expressly to declare that nothing of the same sort should be done in future.

Is it of consequence to the public by whom and how private property is inherited, which, whoever possess it, will in the main be spent in ministering to one person's individual wants and enjoyments—and is the use made of a like sum, specifically set apart for the benefit of the public, or of an indefinite portion of the public, a matter in which the nation has no concern? Or shall we say it is supposed by King, Lords, and Commons, and the Judges of the land, that a man cannot know what partition of his property among his descendants, thirty years hence, will be for the interest of those descendants themselves; but that he may know (though he have scarcely learnt his alphabet) how children may be best educated five hundred years hence; how the necessities of the poor may then be best provided for; what branches of learning, or of what is called learning, it will be most important to cultivate, and by what body of men it will be desirable that the people should be taught religion, to the very end of time?

Men would not yield up their understandings to doctrines like

these, if they were not under some strong bias. Such thoughts never sprung from reason and reflection. The affections have here usurped the judgment-seat, and pronounced in place of the intellect. The cry about robbing the Church, spoliation of endowments, &c., means only that the party likes better the purposes to which the monies are now applied, than those to which he thinks they would be applied if they were resumed:—a feeling, which, if it be founded on conviction, we must be contemptible to blame: but were it even just, we do not see why a man, who has got at his conclusions by good arguments, should defend them by bad. It may be very unwise to alienate the property of some particular foundation; but that does not make it robbery. If it be inexpedient, try to prove it so; but do not pretend that it is a crime to disobey a man's injunctions who has been dead five hundred years. We fear, too, that this zeal for the inviolability of endowments proceeds often from a feeling, which we find it more difficult to bear with—that unreasoning instinct, which renders those whose souls are buried in their acres, or pent up in their money bags, partizans of the *uti possidetis* principle in all things; the dread, that if any thing is taken from any body, every thing will be taken from every body; a terror, the more passionate because it is vague, at seeing violent hands laid upon their Dagon *money*, though it be but to rescue him from the hands of those who have filched him away.

That this is the real source of much of the horror which is felt at a bare proposal that the Legislature should lay a finger upon the estates of a public trust, although it be to restore them to their original purposes, is manifest from this; that the same persons can witness the most absolute perversion and alienation of the endowment from its destined ends, by the slow silent creeping-in of abuse in the hands of the trustees themselves, and not feel the slightest discomposure. Wherefore?—their solicitude was not for the objects of the endowment, but for the safety and sacredness of "vested rights." They dislike the example of searching in a person's pocket, although it be for stolen goods. For them, it is enough if the nine points of the law maintain their wonted sanctity. Those they are sure they have on their side, if any troublesome questioner should come, and, in their turn, incommode *them*. The tenth point is much more intricate and obscure, and they have not half so much faith in it.

To every argument tending to prove the *utility* of the Church of England, or of any other endowed public institution, we shall at all times lend an open ear. Like all reasons which are brought to show the inexpediency of a proposed innovation, they cannot be too carefully weighed. But when it is called spoliation of property, for the State to alter a disposition made by the State itself,

or by an individual who died six hundred years ago, we answer, that no man ought to be exercising rights of property six hundred years after his death; that such rights of property, if they have been unwisely sanctioned by the state, ought to be instantaneously put an end to; that there is no fear of robbing a dead man; and no reasonable dead man who gave his money when living, for the benefit of the community, would have desired that *his* mode of benefiting the community should be stuck to when a better could be found.

3. Thus far of the imaginary rights of the founder. Next, as to those rights of another kind, which, in the case of an existing endowment, have usually sprung up in consequence of its existence; we mean the life interests of the actual holders. How far are these analogous to what are deemed rights of property? —that is, rights which it is unjust to take from a man without his consent, or without giving him a full equivalent.

There are some endowments in which the life interests amount to rights of property in the strictest sense. These are such as are created for the application of their revenues to the mere use and enjoyment of individuals of a particular description; to give pensions to indigent persons, or persons devoted to particular pursuits: to relieve the necessities, or reward the services, of persons of a particular kind, by supporting them in almshouses or hospitals.

There are probably very few of these endowments which are fit to continue: mankind have begun to find out that the mass of poverty is increased, not diminished, by these impotent attempts to keep pace with it by mere *giving*. All, however, who are now actually benefiting by such institutions, have a right to the continuance of the benefit, which should be as inviolable as that of the weaver to the produce of his loom. They have it by gift; precisely as if the founder was alive, and had settled it upon them by deed under hand and seal. To take it from an existing incumbent would be an *ex-post-facto* law of the worst kind. It would be the same sort of injustice as if, in abolishing entails, the *existing* landed proprietors had all been ejected from their estates, on the plea that the estates had *come* to them by entail from their predecessors.

These rights, however, are never any thing but life interests. Such pensions or alms are not hereditary. They are not transmissible by will, or by gift. There is no assignable person standing in remainder or reversion; no individual specially designated, either by law or custom, to succeed to a vacancy as it arises. No person would suffer any privation, or be disappointed in any authorized expectation, by the resumption of the endowment at the death of the existing incumbents. There is no loss,

where nobody will ever know who has lost. To say that the funds cannot rightfully be resumed at the expiration of the life interests, because somebody or other would succeed to them if they continued to exist, is tantamount to affirming, that the army or navy can never be reduced without an act of spoliation, because, if they were kept up, somebody, to be sure, would be made a cadet or a midshipman, who now will not.*

But there is another, and a far more important class of endowments, where the object is not a provision for individuals of whatsoever description, but the furtherance of some public purpose: the diffusion of religious instruction, for example, or the education of youth. Such, for instance, is the nature of the Church property, and the property attached to the Universities and the foundation schools. The individuals through whose hands the money passes, never entered into the founder's contemplation otherwise than as mere trustees for the public purpose. The founder of a College at Oxford did not bestow his money in order that some men then living, and an indefinite series of successors appointing one another in a direct line, might be comfortably fed and clothed. He, we may be sure, intended no benefit to them, further than as a necessary means to the end he had in view—the education of youth, and the advancement of learning. The like is true of the Church property: it is held in trust, for the spiritual culture of the people of England. The Clergy and the Universities are not proprietors, nor even partly trustees and partly proprietors: they are called so, we know, in law, for the convenience of classification; but it is a classification which only tends to mislead. The trustees are indeed, at present, owing to the supineness of the Legislature, the sole tribunal empowered to judge of the performance of the trust: but it will scarcely be pretended that the money is made over to them for any other reason than because they are charged with the trust,—or that it is not an implied condition, that they shall apply every shilling of it with an exclusive regard to the performance of the duty entrusted to the collective body.

Yet of persons thus situated, persons whose interest in the foundation is entirely subsidiary and subordinate, the whole of whose rights exist solely as the necessary means to enable them to perform certain duties—it is currently asserted, and that not

* Charities or liberalities of this kind are not always unconditional; they may be burthened with the performance of some duty. Still, if the duty be merely an incidental charge, and the main purpose of the endowment be a provision for the individuals, the Legislature, though it may release the incumbents from the performance of the duty, is not at liberty, on that pretext, to make them forfeit the right. This they ought to retain for their lives, or for the term of years for which it was conferred; provided they hold themselves in readiness to fulfil its conditions, so far as they lawfully may.

modestly, and in a tone of discussion, but angrily, abusively, and in the spirit of arrogant assumption, that the endowments of the Church and of the Universities are THEIR *property;* to deprive them of which would be as much an act of confiscation as to rob a landowner of his estate!

Their property! In what system of legislative ethics, or even of positive law,* is an estate in the hands of trustees the property of the trustees? It is the property of the *cestui que trust:* of the person, or body of persons, for whose benefit the trust is created. This, in the case of a national endowment, is the entire people.†

4. The claims of the Clergy, and of the various members of the Universities, to the retention of their present incomes, are of a widely different nature from those rights which are intended when we speak of the inviolability of property, and stand upon a totally different foundation. The same person who is a trustee, is also a labourer. He is to be paid for his services. What he is entitled to is his, wages while his services are required, and such retiring allowance as is stipulated in his engagement. All his just pretensions depend on the terms of his contract. Though there might be inhumanity, there would be no injustice, in turning him out into the streets, when his services are no longer needed; unless the contract by which he was engaged had expressly and tacitly provided otherwise.

It is, however, a fact, that in the majority of cases, and particularly in the case of the Church and of the Universities, the incumbents hold their emoluments under an implied contract, which fully entitles them to retain the whole amount during the term of their lives.

If the army were to be remodelled, or to be reduced, and the whole of the officers changed, or a part of them discarded; and if these were thrown loose upon the world, without allowing them half-pay, or the pension of their rank; there would not (we think

* If any caviller should say (and he must be a caviller who would say) that the English common law is an exception, inasmuch as trusts are not recognized or enforced by the common law Courts, the legal estate vesting in the trustee; we answer that we cannot consider any thing as law which does not actually obtain as such, but is superseded by the contrary mandates of the rival power Equity.

† In the case of endowments, which, though existing for public purposes, are not national but local, such as the estates of the City of London, the *cestui que trust* is not the entire people, but some limited portion of them, namely, those who are directly reached by the benefit intended to be conferred. To apply such property to *national* purposes, without the consent, duly signified, of the fractional part of the nation, which is interested in it, might be wrong. But that fractional portion is generally far larger than the body which the law now recognizes as the proprietor. We are ready to maintain, for example, that if the Legislature (as it ought) should unite the whole of the metropolis into one body for municipal purposes, all the estates of the City of London, and of all the incorporated trades, might be applied to the benefit of that collective body without a particle of injustice.

it will be allowed) be any spoliation of property. But it might be said, with perfect justice, that there would be a breach of an implied contract; because the State would be defeating an expectation raised by its own uniform practice. Half-pay, or a pension, is certainly not *promised* to an officer when he enters the army; he does not give his services on that express *condition*. But the regulations of the army have from time immemorial sanctioned the practice, and led the officers to count upon it, and they give their services on that *understanding*.

The case of the clergyman only differs from that of the military officer in this, that the one, by custom, may be deprived of his place, but retains a part of its emoluments; the other, by a different custom, retains his place, emoluments, and all, to the very end of his days. If this were the practice in the army, then, instead of half-pay, an officer would never retire on less than full; and all persons would see that, whether this was a good practice or no, it ought not to be abolished retrospectively. The same argument holds good in the case of the clergyman.

It cannot be doubted that where the emoluments of a public officer have, by the uniform practice of ages, been considered as placed out of the control of the Legislature, to exercise that control to the disadvantage of the individual, without giving him notice before he accepts the office, is an injustice to him. It gives him reasonable ground for complaining of a breach of contract, and should be scrupulously avoided; even if it were not something more than merely impolitic, to immolate large classes of men for the pecuniary gain of the remainder; and most unwise to teach a multitude of influential persons that their only means of maintaining themselves and their families in their accustomed comfort is by opposing a successful resistance to political reforms.

In return for the continuation of the life interests, after releasing the incumbents from the performance of accompanying duties; the State, of course, would acquire a right to the services of the individuals in any other mode in which it could turn them to useful account; provided it were one suited to the station they had formerly filled.

5. We have endeavoured to make as clear as possible the real grounds of the moral question respecting the interference of the Legislature with foundations. We have shown that it is no violation of any right which ought to exist in the founder, to set aside his dispositions many years after his decease; but that where individuals have been allowed to acquire beneficial interests in the endowment, these ought in general to be respected; being, in most cases, either rights of property for life, or rights for life by virtue of an implied contract. But with the reservation of these life interests, the Legislature is at liberty to dispose,

at its discretion, of the endowment; after that moderate number of years has elapsed from the date of its formation, beyond which the foresight of an individual cannot reasonably be supposed to extend.

We feel certain that the conclusion which we have just stated is fully made out, and that nothing in the nature of an argument capable of bearing examination, can be brought to invalidate it. But it is harder, in some cases, to convince men's imagination than their reason; and we are not sure that we have said enough to destroy the force of an objection, which is yet a mere illusion of the imagination, by the aid of a collective name.

Would you rob the Church? it is asked. And at the sound of these words rise up images of rapine, violence, plunder; and every sentiment of abhorrence which would be excited by a proposition to take away from an individual the earnings of his toil, or the inheritance of his fathers.

But the Church! Who is the Church? Who is it that we desire to rob? Who are the persons whose property, whose rights we are proposing to take away?

Not the clergy; from them we do not propose to take anything. To every man who now benefits by the endowment, we have said that we would leave his entire income; at least until the State shall offer, as the purchase money of his services in some other shape, advantages which he himself shall regard as equivalent.

But if not the clergy, surely we are not proposing to rob the laity: on the contrary, they are robbed now, if the fact be, that the application of the money to its present purpose is no longer advisable. We are exhorting the laity to *claim* their property out of the hands of the clergy; who are not the church, but only the managing members of the association.

Qui trompe-t-on ici? asks Figaro. *Qui vole-t-on ici?* may well be asked. Who suffers by the robbery when every body robs nobody? Show us the man, woman, or child who is to be robbed, and he shall be forthwith unrobbed; we will warrant him harmless at our own risk. But though no man, no woman, and no child is robbed, the Church it seems is robbed. What follows? that the Church may be robbed, and no man, woman, or child be the worse for it. If this be so, why, in Heaven's name, should it not be done? If any hard cash can be squeezed out of an abstraction, we are for appropriating it at once. We had no idea that the region

> "Where entity and quiddity,
> The ghosts of defunct bodies, fly,"

was an Eldorado of riches. We wish all other abstract ideas had as ample a patrimony. It is fortunate that their estates are of a less volatile and airy nature than themselves, and that here at

length is a "chimæra bombinans in vacuo," which lives upon something more substantial than "secundas intentiones." We hold all such *entia rationis* to be fair game, and their possessions a legitimate subject of invasion and conquest.

Any act may be a crime, if calling names could make it so; but the robbery that we object to, must be something more than robbing a word. The laws of property were made for the protection of men, and not of phrases. As long as the bread is not taken from any of our fellow creatures, we care not though the whole English dictionary had to beg in the streets. Let those who think it a robbery for the nation to resume what we say is its own, tell us whose it is; let them inform us, what human creatures it belongs to; not what letters and syllables. The alphabet has no property, and if it brings an action for damages in any court where we are judge, it shall be nonsuited.

But the church, it will be said, is a corporation; and a corporation is a *person*, and may hold property, and bring an action at law. A corporation never dies, but is like a river, ever flowing, yet always the same; while it empties at one extremity it fills at the other, and preserves its identity by the continuity of its existence. Whatever is acquired for the corporation, belongs to the corporation, even when all its members have died out, and been succeeded by others. So London stands upon the Thames as it did at the Conquest, though not one drop of water be the same.

It is quite unnecessary to remind us of all this. It is true that such is the law. We admit that the law can call a man now living, and a man not yet born, the same person; but that does not hinder them from being two different men. After declaring them one person, it may ordain, that the income held by one in a certain capacity, shall pass, on his death, to the other. There is nothing at all inconceivable in the idea; so far from it, that such is actually the fact. It is as simple and as easy, as to say that a man's income shall pass to the man's own son. It is one of the modes in which property may be legally transmitted. It is part of the law of inheritance and succession.

There is not the slightest intention entertained of disputing all this. The law is as precisely as it is said to be: but because the law is so, does it follow that it ought to be? or that it must remain protected against amendment, more than any other of the laws which regulate the succession to property?

All, or almost all, laws give rights to somebody. By the abrogation of any, or almost any laws, some rights would cease to exist. But because a law has once been enacted, ought it to subsist till the end of all things? We know that there are some alterations in the law, which would be, morally speaking, infringements of property. What makes them so? Not, surely,

the mere fact, inseparable from the repeal of any law whatever, that the rights which it created, cease to exist. Where then lies the distinction? There is no difficulty about it, nor ever was. The difference is, that some laws cannot be altered without painfully frustrating existing and authorized expectations; for which therefore, compensation is in all or most cases due. Now in the case of church property no authorized expectations are defeated, except those of existing incumbents: this evil is prevented if the life interests of the incumbents are preserved to them. To make the semblance of an injury where there is none, nothing better can be thought of than to lump up the living incumbents and their unborn successors into one undivided mass, call the entire heap one person, and pretend that not to give to the unborn man, is to take from the living one.

Our argument, it is true, professes only to hold good in morality; we do not affect to believe it would hold good in law. What we propose would be contrary to law. Repealing a law is generally contrary to that law. To resume endowments would incontestably be to set aside, by an act of the legislature, a disposition of property lawfully made. It would be a change in the laws; but a change which is allowable, if to alter a disposition of law be ever allowable. The fact of its being a disposition of property can make no difference. Property surely may be appropriated by law, to purposes from which it may be highly desirable that it should be alienated. Much property is set apart by the laws of all idolatrous nations, for the special use and service of their gods. Large revenues are annually expended in offerings to those gods. To resume those revenues would manifestly be robbing Baal; they are his by law: law cannot give a clearer right of property than he has to them. A lawyer, addressing a court of justice, would have nothing to object to this argument: but a moralist, or a legislator, might say, that the revenues were of no use to Baal, and that he would never miss them.

We, of this generation, are not addicted to falling down before a Baal of brass or stone: the idols we worship are abstract terms: the divinities to whom we render up our substance are personifications. Besides our duties to our fellow countrymen, we owe duties to the *constitution;* privileges which the landlords, or the merchants have no claim to, must be granted to *agriculture*, or *trade*: and when every clergyman has received the last halfpenny of his dues and expectations, there are rights of *the Church* behind, which it would be sacrilege to violate.

For all such rights we confess our utter indifference. The only moral duties which we are conscious of, are towards living beings, either present or to come; who can be in some way

better for what we do or forbear. When we have done our duty to all these, we feel easy in our minds, and sleep with an untroubled conscience the sleep of the just; a sleep which the groans of no plundered abstraction are loud enough to disturb.

6. If our case were not already far more than sufficiently made out, it would be pertinent to observe that the Church of England, least of all religious establishments, is entitled to dispute the power of the legislature to alter the destination of endowments, since it owes to the exercise of such a power all its own possessions.

The Roman Catholic church derived its property from an earlier source than any of the existing governments of Christendom: it is moreover a society within itself, which existed anterior to the state, which is organized independently of the state, and no changes in the state can affect its identity, or its constitution. Its endowments too, or a great part of them, came into its hands not for public purposes but for private; not in trust, but by fair bargain and sale; the donor taking out the value in masses for his private salvation; and thereby effecting an earlier liberation of his individual soul from purgatory. If any ecclesiastical establishment, therefore, could be entitled to deem itself ill-used in having its property taken away from it, this might. Not so the Church of England; she, from her origin, never was anything but a state church; all the property she ever had, the state first took from the Roman Catholic church; exercising therein a just and proper attribute of sovereignty; but perpetrating a flagrant wrong in paying little or no regard to life interests, and consigning the incumbents to penury. The corporation which was then turned out of house and home, still exists, and is in every respect the same as before: but if the church of England were separated from the state, its identity, as a corporation, would be gone: the present religious society would be dissolved, and a new one formed, under different rules and a different principle of government; from a monarchy it would be changed to a republic, from a system of nomination to one of popular election. A Catholic bishop can look out upon the fair and broad domains of his Protestant substitute, and say, all this would have been mine. But let the state endowments be once withdrawn from the church of England, her mitred but unpalaced prelates will indulge in no such delusion: nobody, we suppose, will then stand up for the unscriptural and simoniacal abuses of lay-patronage and *congés d'élire;* and the divine who for his piety and learning shall have been elected rector of Stanhope, or bishop of Winchester, if he ever cast a wistful thought towards the pristine appendages of his dignity, will check it by the reflexion, that they would not have belonged to *him,* but to some political tool, some tutor or chaplain

of a minister, or some stupid younger son of a squirearchal house. A Catholic prelate, no doubt, believes at heart that he has been robbed; as the descendants of the Pretender would have believed to the latest generation, that they ought to be Kings of England. But an English Protestant bishop who (after his church in ceasing to receive state pay, had ceased also to be fashioned as a state tool) should still fancy that *he* was the party losing by the cutting off of the salary, must be strangely ignorant of the history of England's political religion, as well as of something else which would have taught him that a person honestly selected to serve God, was not a likely individual to have been appointed high-priest of Mammon.

7. We have now arrived at the commencement of the second, and only remaining part of our task. We have contended, that endowments after a certain lapse of time may, at the discretion of the legislature, be diverted from their original purposes. It remains to consider by what principles or rules the legislature is bound to govern itself in the exercise of this discretion.

We would prescribe but one rule; it is somewhat general, but sufficient to indicate the spirit in which the control of the legislature ought to be exerted. It is this. When a resolution has been taken (which should never be, except on strong grounds) to alter the appropriation of an endowment; let the first object be to employ it usefully; the second, to depart as little from the original purpose of the foundation, as is consistent with that primary object. The endeavour should be, even in altering the dispositions of the founder, still to carry into effect as much of his intention as it is possible to realize without any sacrifice of substantial utility.

This limitation of the discretionary power of interference residing in the legislature, would meet, we suspect, with as much resistance (though from a very different sort of persons) as the discretionary power itself. It will be objected to by some, because they are desirous to confiscate the existing endowments, towards paying off the national debt, or defraying the current expenses of the state: by others, because they deem foundations altogether to be rather mischievous than useful, and the intentions of founders to be undeserving of any regard. This last opinion is the more entitled to notice, as among its supporters is to be numbered the great and good Turgot. That eminently wise man thought so unfavourably of the purposes for which endowments are usually made, and of the average intelligence of the founders, that he was an enemy to foundations altogether.

Notwithstanding our deep reverence for this illustrious man, and the great weight which is due to his opinion on all subjects which he had maturely considered, we must regard his opinion on

this subject, as one of what is now allowable to call the prejudices of his age. The wisest man is not safe from the liability to mistake for good the reverse of some inveterate and grievous ill. The clearer his discernment of existing evils, and the more absolutely his whole soul is engaged in the contest against them, the more danger that the mischiefs which chiefly occupy his own thoughts, should render him insensible to their contraries, and that in guarding one side he should leave the other uncovered. If Turgot did not wholly escape this error, which was common to all the philosophers of his time, ample allowances may be justly claimed both for him and for them. It is not the least of the mischiefs of our mischievous prejudices, that in their decline they raise up counter-prejudices, and that the human mind must oscillate for a time between opposite extremes, before it can settle quietly in the middle. The prejudices of the French philosophers were such as it was natural should exist, in an age when all established institutions were in the very last stage of decay and decrepitude, preparatory to the catastrophe by which, soon after, they were swept away:—when whatever was meant to transmit light, had become a curtain to keep it out, and whatever was designed for the protection of society, had turned itself to preying upon society;—when every trust which had been reposed in individuals for the benefit of the species, had degenerated into a selfish job, and the canker had eaten so deeply into the heart of civilization, that the greatest genius of his time deliberately preferred the condition of a naked savage.

The principal foundation which existed in the time of Turgot was the Catholic hierarchy; when, if it had lost some part of its capacity of evil, it could less than ever pretend to contain any spark of good; when it had become irreconcileably hostile to the progress of the human mind, because that progress was no longer compatible with belief in its tenets; and when, to stand its ground against the advance of incredulity, it had been driven to knit itself closely with that temporal despotism to which it had once been a substantial, and the only existing, impediment and control. After this came monastic bodies, constituted originally for purposes which derived all their value from false religion, and now not even fulfilling what they professed; bodies, whose very existence had become one vast and continued lie. Next came universities and academical institutions, which had once taught all that was then known; but having ever since indulged their ease by remaining stationary, found it for their interest that knowledge should do so too—institutions for education, which always kept a century behind the community which they affected to educate; who, when Descartes appeared, publicly censured him for differing from Aristotle; and when Newton appeared, anathematized him for

differing from Descartes. Then there were hospitals which killed more of their unhappy patients than they cured, and charities, of which the superintendents, like the licentiates in Gil Blas, got rich by taking care of the affairs of the poor: or which at best made twenty beggars, by giving, or pretending to give, a miserable and dependent pittance to one.

The foundations, therefore, were among the grossest and the most conspicuous of the familiar abuses of the time; and beneath their shade flourished and multiplied large classes of men, by interest and habit the protectors of all abuses whatsoever. What wonder, that a life spent in practical struggles against abuses should have strongly prepossessed Turgot against foundations in general. Yet the evils existed, not because there were foundations, but because those foundations were perpetuities, and provision was not made for their continual modification, to meet the wants of each successive age.

The opinion of Turgot was sufficiently in accordance with the prevailing philosophy of his time. It is rare that the same heads and the same hands excel, both in pulling down and in building up. The work of urgency in those days was to make war against evil: this the philosophers did, and the negation of evil was nearly all the good which their philosophy provided for. They seem to have conceived the perfection of political society to be reached, if man could but be compelled to abstain from injuring man; not considering that men need help as well as forbearance, and that Nature is to the greater number a severer taskmaster even than man is to man. They left each individual to fight his own battle against Fate and Necessity, with little aid from his fellow-men, save what he, of his own spontaneous seeking, might purchase in open market and pay for.

If this be a just estimate of the exigencies of human society; if man requires nothing from man, except not to be molested by him, nor from government, except to be guarded against molestation; undoubtedly foundations, and many other things, are great absurdities. But we may conceive a people, perfectly exempt from oppression by their government, amply protected by that government, both against foreign enemies and against force or fraud as between its own citizens; we may conceive all this secured, as far at least as institutions can secure it, and yet the people in an abject state of degradation, both physical and mental. We should not despair of proving, that only in certain critical and transitional periods of history is the government itself the cause of much evil, or would a change in the government produce much good: at all other times whatever evils exist in the government, are but the too faithful picture of the evils existing in the national mind: of little importance compared with

these last, and incurable except in proportion as these are cured.

The primary and perennial sources of all social evil, are ignorance and want of culture. These are not reached by the best contrived system of political checks, necessary as such checks are for other purposes. There is also an unfortunate peculiarity attending these evils. While they are so much the greatest of all calamities, they are those of which the parties suffering from them are apt to be the least aware. Of their bodily wants and ailments mankind are generally conscious; but the want of the mind, the want of being wiser and better, is in the far greater number of cases unfelt: misery indeed is felt, but is ascribed to any imaginable cause except the true one. This want has, moreover, the property of disguising from mankind, not only itself, but the most eligible means of providing even for the wants of which they are conscious.

On what, then, have mankind depended, on what must they continue to be dependent, for the removal of their ignorance and their defect of culture? Mainly, on the unremitting exertions of the more instructed and cultivated, whether in the position of the government or in a private station, to awaken in their minds a consciousness of this want, and to facilitate to them the means of supplying it. The instruments of this work are not merely schools and colleges, but every means by which the people can be reached, either through their intellects or their sensibilities—from preaching and popular writing, to national galleries, theatres, and public games.

Here, then, is a wide field of usefulness open for foundations; and in point of fact, they have been destined for such purposes oftener than for any other. We are of opinion that such endowments are deserving of encouragement, where a sufficiency do not already exist; and that they ought not to be appropriated in another manner, as long as any opening remains for their useful application in this.

A doctrine is indeed abroad, and has been sanctioned by many high authorities, beginning with Adam Smith, that endowed establishments, for education or other public purposes, are a mere premium upon idleness and inefficiency. Undoubtedly they are so, when it is nobody's business to see that the receivers of the endowment do their duty; when (what is more) every attempt to regulate, or so much as to know (further than the interested parties chuse to make it known) the manner in which the funds are employed, and the nature and extent of the service rendered in consideration for them, is resented and exclaimed against as an atrocious interference with the inviolability of private property. But this is the condition of most of our own endowed establish-

ments is too true. But instead of fixing our eyes exclusively upon what is nearest to us, let us turn them towards the endowed Universities of France and Germany, and mark if those are places of idleness and inefficiency. Let us see whether, where the endowment proceeds from the governments themselves, and where the governments do not, as here, leave it optional whether that which is promised and paid for shall or shall not be done, it be not found that, notwithstanding the acknowledged defects of these governments, the education given is the very best which the age and country can supply. Let us even look at home, and examine whether, with all the grievous abuses of the endowed seminaries of Great Britain, they are, after all, a particle worse than, or even so bad as, almost all our other places of education. We may ask, whether the desire to gain as much money with as little labour as is consistent with saving appearances, be peculiar to the endowed teachers? Whether the plan of nineteen-twentieths of our unendowed schools, be not an organized system of charlatanerie for imposing upon the ignorance of the parents? Whether parents do, in point of fact, prove themselves as solicitous, and as well qualified, to judge rightly of the merits of places of education, as the theory of Adam Smith supposes? Whether the truth be not, that, for the most part, they bestow very little thought upon the matter; or if they do, show themselves in general the ready dupes of the very shallowest artifices? Whether the necessity of keeping parents in good humour does not too often, instead of rendering the education better, render it worse; the real ends of instruction being sacrificed, not solely (as would be the case under other circumstances) to the ease of the teacher, but to that, and *also* to the additional positive vices of clap-trap and lip-proficiency? We may ask, whether it is not matter of experience, that a schoolmaster who endeavours really to educate, instead of endeavouring only to seem to educate, and laying himself out for the suffrages of those who never look below the surface, and only for an instant at that, is almost sure, unless he have the genius and the ardour of a Pestalozzi, to make a losing speculation? Let us do what we may, it will be the study of the mere trading schoolmaster to teach down to the level of the parents, be that level high or low; as it is of the trading author, to write down to the level of his readers. And in the one shape as in the other, it is at all times and in all places indispensable, that enlightened individuals and enlightened governments should, from other motives than that of pecuniary gain, bestir themselves to provide (though by no means forcibly to impose) that good and wholesome food for the wants of the mind, for which the competition of the mere trading market affords in general so indifferent a substitute.

It may be said, however, that where there is a wise government,

and one which has the perfect confidence of the people, whatever expense it may be requisite either to defray or to advance for national education, or any other of the purposes for which endowments exist, ought rather to be furnished by the government, and paid out of the taxes; the government being, probably, a better judge of good education than an average man, even an average founder.

To this we answer, that the full benefit of the superior wisdom of the government would be obtained in the case of old foundations, by that discretionary power of modifying the dispositions of the founder, which, as we have contended at so much length, ought to be exerted by the government as often as it sees cause. We certainly agree, that if the government is so wise, and if the people rely so implicitly on its wisdom, as to find money out of the taxes for all the purposes of utility to which they could have applied the endowment, it is of no consequence whether the endowment be alienated or no; the alienation is merely nominal. But all know how far the fact at present differs from the above supposition. We can scarcely look forward to a time when it will not be extremely difficult to raise any considerable sum by taxation for any new purpose. But if there were a fund specially set apart, which never came from the people's pockets at all, which was given to them in trust for purposes of education, and which it was considered improper to divert to any other employment while it could be usefully devoted to that; the people would be willing enough to have it applied to that purpose if the government chose. There is such a fund, and it consists of the national endowments.

If, again, it be said, that as the people grow more enlightened, they will become more able to appreciate, and more willing to pay for good instruction; that the competition of the market will become more and more adequate to provide good education, and endowed establishments will be less and less necessary; we admit the fact. And we, for our share, will let the state do what it likes with the endowments, so soon as the legislature, being well constituted and composed of the *élite* of the nation, shall be of opinion that the generality of the private schools and colleges are equal to any which itself can provide.

So much with regard to old endowments; the application of which, to the purpose for which they were destined, ought to be as completely under the control of the government as if the funds were taken directly out of the taxes. But in addition to these old endowments, the liberty of forming new ones, for education and mental culture in all shapes, seems to us of considerable importance; and a limited number of years should, we think, be

allowed, during which the disposition of the founder should undergo no alteration.

We deem this advisable, simply because governments are fallible; and, as they have ample means both of providing and of recommending the education they deem best, should not be allowed to prevent other people from doing the same. No government is entitled (further than is implied in the very act of governing) to make its own opinion the measure of every thing which is useful and true. A perfect government would no doubt be always under the guidance of the wisest members of the community. But no government can unite all the wisdom which is in all the members of the community taken together; much less can a mere majority in a legislative body. And it must be a very conceited government which would shut the door in the teeth of all wisdom but its own. A nation ought not to place its entire stake upon the wisdom of one man, or one body of men, and to deprive all other intellect and virtue of a fair field of usefulness, unless they can be made to square exactly with the intellect and virtue of that man or body. It is the wisdom of a community, as well as of an individual, to beware of being one-sided: the more chances it gives itself, the greater the probability that some will succeed. A government, when properly constituted, should be allowed the greatest possible facilities for what itself deems good; but the smallest for preventing the good which may chance to come from elsewhere. This will not be disputed if the government be a monarchy or an aristocracy: it is quite equally true when the constitution is popular. The disapprobation of the government, in that case, means the disapprobation of the majority: and where the opinion of the majority gives the law, there, above all, it is eminently the interest of the majority, that minorities should have fair play. Sinister interest indeed is often found in a minority, but so, it must also be remembered, is truth: at her original appearance she must be so. All improvements, either in opinion or practice, must be in a minority at first.

We deem it important that individuals should have it in their power to enable good schooling, good writing, good preaching, or any other course of good instruction, to be carried on for a certain number of years at a pecuniary loss. By that time, if the people are intelligent, and the government wisely constituted, the institution will probably be capable of supporting itself, or the government will be willing to adopt all that is good in it, for the improvement of the institutions which are under the public care. For, that the people can see what is for their good, when it has long been shown them, is commonly true; that they can foresee it—seldom.

Endowments, again, are a national and convenient mode of

providing for the support of establishments, which are interesting only to a peculiar class, and for which, therefore, it would be improper to tax all the members of the community. Such, for instance, are colleges for the professional instruction of the clergy of a sect; as Maynooth, York, or Highbury. Such, perhaps, (but on this we do not pronounce a decided opinion) is a national gallery.

8. If, then, it be in truth desirable that foundations should exist, which we think is clear from the foregoing and many other considerations; it would seem to follow, as a natural consequence, that the appropriation made by the founder should not be set aside, save in so far as paramount reasons of utility require; that his design should be no further departed from than he himself would probably have approved, if he had lived to the present time, and participated to a reasonable degree in its best ideas. If foundations deserve to be encouraged, it is desirable to reward the liberality of the founder, by allowing to works of usefulness (though a perpetuity is impossible) as prolonged a duration of individual and distinguishable existence, as circumstances will admit.

But this is not the only, nor perhaps the strongest reason, for keeping to a certain extent in view, even in an alienation of endowments, the intention of the founder. We conceive that almost any fixed rule, consistent with ensuring the employment of the funds for *some* purpose of real utility, is preferable to allowing financiers to count upon them as a resource applicable to all the exigencies of the state indiscriminately: otherwise they may be seized on to supply, not the most permanent or essential, but the most immediate and importunate demands: one year of financial difficulty might suffice to dissipate funds that centuries would not replace; and the time for an interference with foundations would be determined, not by the necessity of a reform, but by the state of the quarter's revenue. A still more cogent consideration, is the immense importance to society of the associations which lead mankind to respect the declared will of every man in the disposal of what is justly his own. That will is surely not least deserving of respect, when it is ordaining an act of beneficence. And any uncalled-for deviation from it (if not, strictly speaking, a violation of property), runs counter to a feeling so nearly allied to those on which the respect for property is founded, that there is scarcely a possibility of infringing the one without shaking the security of the other.

It is no violation of these salutary associations to resume an endowment, if it be done with the conscientious reservation which we have suggested, Respect for the intentions of the founder is not shown by a literal adherence to his mere words,

but by an honest attempt to give execution to his real wishes; not sticking superstitiously to the means which he hit upon accidentally, or because he knew no better; but regarding solely, as he himself did, the end which he sought to compass by those means.

The first duty of the legislature, then, is to employ the endowment *usefully:* and that in a *degree* corresponding to the greatness of the benefit contemplated by the donor. But it is also of importance, that not only as great a benefit, but as far as possible the same kind of benefit, should be reaped by society, as that which the founder intended. We are not to consider to what object we, under the temptations of the moment, should like best to apply the money; but rather, what, among all purposes of unquestionable utility, which a reasonable man in these days would value sufficiently to give this sum of money for, is the particular purpose most resembling the original disposition of the founder.

Thus, money assigned for purposes of education, should be devoted, by preference, to education: the kind, and the mode, being altered, as the principles and practice of education came to be better understood. Money left for giving alms, should certainly cease to be expended in giving alms; but it should be applied, in preference, to the general benefit of the poorer classes, in whatever manner might appear most eligible. The endowments of an established church should continue to bear that character, as long as it is deemed advisable that the clergy of a sect or sects should be supported by a public provision of that amount: and under any circumstances, as much of these endowments as is required should be sacredly preserved for the purposes of spiritual culture; using that expression in its primitive meaning, to denote the culture of the inward man, his moral and intellectual well-being, as distinguished from the mere supply of his bodily wants.

Such, indeed, as has been forcibly maintained by Mr. Coleridge,* was the only just conception of a national clergy, from their first establishment. To the minds of our ancestors they presented themselves, not solely as ministers for going through the ceremonial of religion, nor even solely as religious teachers in the narrow sense, but as the *lettered* class; the *clerici* or clerks: whose highest concern indeed was religion, as it was of all other men; but who were appointed generally to prosecute all those studies, and diffuse all those impressions, which constituted mental culture, as then understood; which fitted the mind of man, for his condition, destiny, and duty, as Man. In pro-

* See his little work on Church and State.

portion as this enlarged conception of the object of a national church establishment has been departed from, so far, in the opinion of the first living defender of our own establishment, it has been perverted both in idea and in fact from its true nature and ends. A national *clerisy* or clergy, as Mr. Coleridge conceives it, would be a grand institution for the education of the whole people: not their school education merely, though that would be included in the scheme; but for training and rearing them by systematic culture continued throughout life, to the highest perfection of their mental or spiritual nature.

The benefits of such an institution, and how it ought to be constituted so as to be free from the vices of an established church as at present understood, are questions too extensive to be further adverted to in this place. We will rather say, as being more pertinent to our present design, that if endowments (like the Church property) originally set apart for what was then deemed the highest spiritual culture, were diverted to the purposes of the highest spiritual culture which the intellects of the present age could devise, there would be no departure from the intentions of the original owners, but, on the contrary, a faithful fulfilment of them, when a literal and servile adherence to the mere *accidents* of the appropriation would be the surest means of defeating its essentials. We may add, that the perfect lawfulness of such an alienation as this, is explicitly laid down by the eminent writer to whom we have referred. It is part of his doctrine, that the state is at liberty to withdraw the endowment from its existing possessors, whenever any body of persons can be found, whether ministers of religion or not, by whom the ends of the establishment, as he understands them, are likely to be more perfectly fulfilled. It is the more important to place this admission upon record, as the most able and accomplished of the rising defenders of the Church of England have evidently issued from Mr. Coleridge's school, and have taken their weapons chiefly from his storehouse.

If, however, we seize upon the endowments of the Church, not for the civilization and cultivation of the minds of our people, but to pay off a small fraction of the National Debt, or to supply a temporary financial exigency,—we shall not only squander for the benefit of a single generation, the inheritance of all posterity; we shall not only purchase an imperceptible good, by sacrificing a most important one; but by disregarding entirely the intentions of the original owners, we shall do our best to create a habit of paltering with the sacredness of a trust. It matters not that the property has now become *res nullius*, and is therefore, properly speaking, our own. It is none of our earning; others gave it to us, and for purposes which it may be a *duty* to set aside, but

which cannot honestly be sacrificed to a *convenience*. We have not the slightest reason to believe that if the owners were alive, and still masters of their property, they would give it to us to be blown away in gunpowder, or to save a few years' house and window tax.

On a pressing exigency, as to avert a national bankruptcy, or repel a foreign invasion, the whole or any part of the endowment might be borrowed; as, in such a case, might any other property, public or private: but subject to the promptest possible repayment.

If any surplus remains, after as much has been done for cultivating the minds of the people, as it is thought advisable to do without making them pay for it, the residue may be unobjectionably applied to the ordinary purposes of government: though it should even then, we think, be considered as a fund still liable to be drawn upon, if hereafter required, for purposes of spiritual culture.

9. We have still to add a few words on the kinds of foundation which ought *not* to be permitted: after which we shall conclude.

No endowment should be suffered to be made, or funds to be legally appropriated, for any purpose which is actually *unlawful*. If the law has forbidden any act, has constituted it an offence or injury, *every* mode of committing the act, or of instigating others to commit it, ought to be prohibited: not some particular modes only. But if the purpose for which the foundation is constituted be not illegal, but only, in the opinion of the legislature, inexpedient, we do not deem this to be a sufficient reason for denying to the appropriation the protection of the law. The grounds of this opinion may be sufficiently collected from the preceding observations.

The only other restriction which we would impose upon the authors of Foundations, is, that the endowment shall not consist of land. The evils of allowing land to pass into Mortmain, are universally acknowledged; and the trustees, besides, ought to have no concern with the money entrusted to them, except to apply it to its purposes. They may desire landed property as a source of power, which is a reason the more for refusing it to them: but as a source of income, it is not suited to their position. They should have only to receive an annuity, and that in the simplest and least troublesome manner: not to realize a rental from a multitude of small tenants. Their time and attention ought not to be divided between their proper business and the duties of a landlord, or the superintendence and management of a landed estate.

The very first step in a general revision of Foundations, and one which would be desirable even if the reform should go no

further, would be to dispose of the estates of all the public trusts in Great Britain, by sale to the highest bidder, and invest the proceeds in the stocks or other monied securities. If the legislature were then to assert its right of control over all endowments of an origin anterior to a certain recent date, the exercise of this control should become a regular department of the administration, and the expenditure of the interest should be brought under the consideration of parliament in an annual report. For until the execution of these trusts shall be subject to the common responsibility which attaches to other public functions, the endowments (at least the greater part of them), for any useful purpose, might fully as well not exist.

ART. II.—THE REGISTRY QUESTION IN FORMER TIMES.

1. *Propositions for Recording and Registering of Deeds and Conveyances, for Preventing Frauds and Deceits in Sales, and Yielding of Possessions of Purchasers.* By W. Leach, of the Middle Temple. London. 1631. 4to.

2. *Reasons and Proposals for a Registry or Remembrancer of all Deeds and Incumbrances of Real Estates, to be had in every County, most necessary and advantageous, as well for Sellers and Borrowers as Purchasers and Lenders: to the Advance of Credit and the General Good, without prejudice to any honest-minded Person.* Most humbly offered to consideration by Nicholas Phillpott, of New Inn. Oxford. 1671. 4to.

3. *The Pretended Perspective Glass; or Some Reasons, of many more, which might be offered, against the proposed Registry Reformation.* London. Printed in the year MDCLXIX. [read MDCLXXI.] 4to.

4. *Reasons for a Registry, showing briefly the great Benefits and Advantages that may accrue to this Nation thereby, and likewise reconciling those mistaken inconveniences which many have conceived thereof.* By a Well-wisher to the Publick Interest of the Nation. London. 1678. 4to.

5. *Reasons against a Registry for Lands, and showing briefly the great Disadvantages, Charges and Inconveniences that may accrue to the whole Nation in general thereby, much overbalancing the particular advantages that are imagined to arise therefrom; in answer to a late book, entitled, Reasons for a Registry, with some Reasons for a Registry of Personal Contracts; humbly offered to consideration.* London. 1678. 4to.

6. *A Treatise showing how Useful, Safe, Reasonable and Beneficial the Inrolling and Registering of all conveyances of Deeds may be to the Inhabitants of this Kingdom.* By a person of great learning and judgment [Sir M. Hale]. London. 1694. 4to. (This Tract has been reprinted several times with the Author's name.)

7. *A Proposal for the Erecting of County Registers for Freehold Lands, showing the great Use and Benefit of them.* By E. B. Esq. London. 1697. 4to.

8. *An Essay on a Registry for Titles of Lands.* By John Asgill, of Lincoln's Inn, Esq. London. 1698. 8vo.

9. *Some Reflections on Mr. Asgill's Essay on a Registry for Titles of Lands.* London. 1698. 8vo.

10. *The Reply to Some Reflections on Mr. Asgill's Essay on a Registry for Titles of Lands.* By way of a Letter to the Author of the Reflections. London. 1699. 8vo.

THE evils arising from the want of a Registry have been felt in this country for centuries past, and the proper remedy for those evils has been repeatedly urged on the legislature. It would not be difficult to discover the reasons of the mischievous and successful resistance to a measure of such evident utility; but as this may, perhaps, be deemed more curious than useful, we shall not enter into an inquiry on the subject. We hope, however, to be able to prove, that, whatever the motives may have been for its rejection, the necessity of a Registry has been so fully established more than a century ago, that, had reason only guided parliament in those days, this question would not require to be agitated in our own time. In perusing some old publications on the subject, we have been so struck with the convincing arguments advanced on one side, and the futility of those on the other, that we have deemed it acceptable to our readers to present them with extracts from various works on both sides of the question. We shall abstain as much as possible from arguing the point ourselves, but leaving to the old champions to defend their respective positions, we doubt not the result. We do so the more willingly in order to show timorous people that the most intelligent part of the community in old days were of the same opinion with the most intelligent in ours and that the opposers of this measure do nothing but bring forward sophisms which have been long ago demolished. We have abstained from referring to authorities of the time of the Commonwealth, lest those who possess a *tender conscience* should deny the truth *in odium auctoris*, being an *Oliver-*

relick—as Fabian Philips calls it—and should mistrust whatever comes from so impure a source as a parliament, (or, to speak more loyally, a *so-called* parliament) "of ignorant and mechanick members." The writers from whom our extracts are derived, wrote either a few years before or after "the glorious revolution of 1688," and all of them before 1700; so that they cannot be suspected of being bitten with the reform mania of our own age. We beg, however, to refer to a writer of the Commonwealth, on a point of fact, to show the mischiefs which the state of the law had produced, and the reasons by which the "ignorant and mechanick party" were compelled to endeavour to apply a remedy to them. Before the bill for amending the law and for introducing a Registry had been proposed, Leach suggested it, and the preamble of an act of parliament which he sketched out runs as follows:—

"Forasmuch as great numbers of secret fraudulent deeds and conveyances, and other frauds and deceits, have been of late years contrived, and more frequent practised than formerly, by many wicked people selling their manors, messuages, lands, tenements, hereditaments and other things, sometimes twice, other times thrice, foure, or five times over, to severall purchasers, for good and valuable consideration, whereby divers honest people of this nation (who have purchased the same leases, rents, annuities or charges out of the same for great summes of money) have been defrauded of all that which they carefully and honestly have laboured for the greatest part of their lives, and afterwards lived in great misery and extremity the residue of continuance of their time; and other of such purchasers by reason of such frauds and deceits have been troubled and turmoyled, and put to great excessive charges and tedious suits; and especially in the Courts of Chancery, or in courts called Courts of Equity, or English Courts, many years together; and yet in the end, by the means aforesaid, have failed of recovery or obtaining that for which they have justly and honestly paid, or any part of their money which they have disbursed on that behalfe, for the prevention thereof: Be it enacted," &c.

That the republican lawyer did not give a high colour to facts to serve his views, may be seen from Sir M. Hale, who fully admitted—

"1st. The great deceit committed by persons by secret judgements, mortgages, conveyances and settlements, whereby purchasers are oftentimes deceived and creditors defeated. 2d. The multitude of chargeable and difficult suits in law, occasioned by pre-conveyances, secret mortgages, and other incumbrances, which probably would be avoided and lessened if all men's estates lay open to the view of others."

Phillpott also strongly insisted upon this well-known fact to show the necessity of a Registry.

"The usefulnesse and benefit to all his majesties subjects of what is proposed (*i. e.* a Registry), appears and is demonstrable in nothing more

than the vast number of suits and actions in the Courts of Westminster, ariseing merely by reason of precedent and concealed incumbrances, which have and daily do wast and consume the whole substance of such as are concerned in them; and two parts in three (at least) of all suits touching real estates, depending in Westminster Hall, are sprung from this mischief."

Asgill particularly alludes to the quantity of law suits caused by the want of a Registry; and the author of the "Reflections on Mr. Asgill's Essay" admits the fact, but says that there were other reasons besides for it; which does not seem to be a good argument to prove that this one cause should not be removed. Asgill's opponent directs his arguments against that gentleman's plan and application of principles, but takes good care to declare, repeatedly, that he does not mean to say that a Registry might not be adapted at some period or other, and freely confesses that the state of the law might be improved; he only objects to Asgill's suggestions:

"I desire the reader to take notice, that what I have said must be understood to be in answer to Mr. Asgill, and in confutation of his hypothesis; and though, perhaps, there may be found some things in it not impertinent to an argument of a Registry in general, yet they must be taken to be levelled purely and singly against the author's book. . . .

"The case of purchasers is much amended by several useful *statutes*, made in the last reigns, and, I doubt not, may still be better secured against secret incumbrances; and it is, I think, something of an argument against it, that this proposal of a Registry has been still rejected by our forefathers, and in times when the state of conveyancing did more require it than now it does. But I affirm nothing; the King, Lords and Commons, are judges of this matter, whose wisdom and determination I shall always take to be the *criterion* of truth and prudence."

In his Reply, Asgill answers these vague and inconclusive remarks in the following pithy words:—

"As for those gentlemen who are so complacent as to declare for a Registry in general, and yet find fault with all that are proposed,—till they shall please to define the nature of what they would have, I presume they must be thought to be against all.

"The want of a General Registry hath been the occasion of multiplying laws to prevent frauds in the titles of lands which might have been easily prevented by a Registry; for all frauds in titles came by concealments, and when they are registered, they can't be concealed. The multiplication (and consequently ignorance) of laws, is a secret curse fallen upon man, which insensibly consumes his estate, without his taking an account of it. There is not a greater article in the laws of England than *the descent of lands to the eldest son as heir*, and yet this being a common case, every man is his own lawyer in it. And, were a Registry settled, the use of it would become so common, that the knowledge of the law and practice of it would become uni-

versal. Whereas the law of titles now lying dispersed in several volumes, which must be compared with one another, 'tis a discouragement to the students of the law themselves to inquire after them."

The objections which were and are urged against a Registry, may be reduced to the following:—1st. Trouble and expense; 2dly. The evils of innovation; 3dly. The discovery of private affairs. The first was and is advanced by those who did not know what else to say; the second seems to have been a favourite with old women, and lawyers in particular; the third with country gentlemen and usurers. In the actual state of society, when distances have been, if we may say so, almost done away with, and the extremities of England brought into contact, the argument as to the trouble caused by distances cannot any longer be brought forward. Yet, as we know honourable and learned members of the House of Commons who might use it to make a show of wit,* it may be amusing to read how the author of the "Reasons against a Registry for Lands" facetiously argued against County Registries, on the ground of the trouble and expense which might be caused by distance:

"Methinks I already see a Registry placed at *East Grinsted* for *Sussex;* and the poor old men and old women riding from *Hasting* to *East Grinsted* in *Sussex,* near forty miles, through the deep clay, after the rate of ten miles a day, with their attorney or solicitor with them, at about 40*s.* expenses *per* day, to register a mortgage for 30 or 40 pound, which the poor borrower had occasion to take up of the lender, to place out his young son apprentice, or to marry his daughter; and, when they come there, they must attend Mr. Register's leisure to search for former incumbrances, and to make entry of their present mortgage; it may be the Register may not be well, or not at home, or, being a great person, not at leisure, *non vacat exiguis,* &c. But, when it is done, away joggs home the joyful mortgager, for that it cost him but 12 or 14 pound, out of his 40 pound, and the mortgagee glad that no other mortgage preceded him in the Registry, not regarding the cold, dirty *December* or *January* journey of the poor old knave that borrowed the money."

Phillpott answers in a few words the objection respecting charges and trouble:

"The charge will be inconsiderable to the great satisfaction they (the mortgagees) receive, by being freed from the danger of precedent titles; and the trouble cannot be much when an office for the purpose is kept in the shire town, or chief city of the county."

But Asgill enters into the point more at large, and his malicious quaintness will be found a match for the facetious description of a journey by the unknown opponent. As Asgill was inclined to a Metropolitan Registry only, he does not mention the trouble of travelling to county-towns; but he points out the mischiefs of

* When this was written, Sir C. Wetherell was member for Boroughbridge.

the existing system in a manner which answers objections of all kinds:

"Two great qualifications," says he, "are necessary to a complete conveyancer, first, *That he be incapable of dispatching business so fast as he should;* secondly, *That he does not dispatch it as fast as he can.* *festina lente* is the conveyancers' motto, and therefore they advise their clients not to hurry them, nor put them out of their own pace; they must think nothing troublesome but the entering the deed in a Registry; to come to a lawyer's chamber twice a-week, to know when they shall come again; then, to have a bill of directions to send for some deed which the lawyer wants, and which perhaps is 100 miles distant, in they know not whose hands; to employ an attorney to search for judgments, statutes, recognizances; deeds enrolled in four courts; to send for a copy of a will proved in a remote diocess, and bring an account of all this to the lawyer, and give him a new fee, and then begin again; and may be two or three such *Recipes* before the title be finished; and the clyents must not think much of all this, but take it as the nature of business.

"And yet I can't say but all this may be necessary, as the case now stands, which must still grow worse, if let alone: for the troubles and hazards of titles must continually increase, until they are reduced to a certainty by a Registry.

"But then, as a Registry would reduce the incertainty of titles, it must thereby take away the delays in conveyancing, and consequently abridge the charges: for, as the *Pharisees* made long prayers, as a pretence or equivalent for devouring widows' houses, so practicers in the law must make out long bills, on pretence of demanding large fees; like some tooth-drawers, who dragg their patients by the jaws about the room, to show them how hardly they earn their money. To cure deficiency in titles, would be as fatal to conveyancers, as the cure of a lame legg to a beggar."

The second objection (fear of innovation) was urged with great force by most of the opponents of registration: its vagueness making it easy to be brought forward, and frightful to those who, not liking the process of argument, are content with leaving that task to others. Accordingly, we find the author of "The Pretended Perspective Glass" beginning his lucubrations in the following ominous strain of ratiocination:—

"It cannot be denied by any who have conversed with the right reason of law and rules of government, that innovations are more than a little dangerous, because there cannot possibly or probably be at once a certain and clear prospect made of all old evils, contingencies, and inevitable consequences, which either will or may happen by it: and therefore have adjudged it to be more conducive to the weal-public rather to suffer some few or seldom mischiefs, not fatal, than many inconveniencies, which will not be escaped in such a *renverse* or ploughing up of all, or the greater part, of the estates and credit of the kingdom, and the product of so many sad effects as will attend it."

Further on, he returns to the charge in the following words:—

"The office of General Remembrancer of Incumbrances hath several Parliaments in the reign of King *James* troubled and attended them for a confirmation, and could never obtain it, was refused and certified by *Sir E. Coke*, and the Judges to whom it was referred, to be against the weal-public, missed of its purpose in the Parliament of King *Charles* the *Martyr*, was entertained by Oliver, and his ignorant and mechanic party, as a ready means to level and overturn our laws, and make his saints some seats or business of judicature in the several counties, but went no farther than its *embrio*, because his so called Parliament could not agree, in six months time, what should be called *incumbrances*; and hath been rejected in a late Session of this Parliament."

The author of the "Proposal for the erecting of County Registers" very justly observes on this subject, that

"The old methods and law-maxims were well enough two or three hundred years agone, when we made no other use of our small ships but fishing, and transporting our forces into *France*; when the elder son was a captain, and all the younger sons soldiers under him, or some other great man. Trade is now become the darling of mankind. Without *trust* there can be no *trade*; and without *trade*, there will not be much *wealth*, the foundation of trust."

The author of the "Reasons for a Registry" treats the objection with great scorn, and answers it in a most forcible manner with the authority of Bacon.

"As for the great clamour of innovation, I doubt not but some formal wiseacres, out of abundance of their politic prudentials, will be ready to lay this terrible stumbling block in the way; but I shall labour to anticipate their pretences with the authority of the learned Lord *Bacon*, in his Essays, whose words are these:—'Surely every medicine is an innovation; and he that will not apply new medicines must expect new evils; for time is the greatest innovator. And if time of course alter things to the worse, and wisdom and counsel shall not alter them to the better, what shall be the end? It is true that what is settled by custom, though it be not good, yet at last it is fit, and those things which have long gone together, are, as it were, confederate among themselves; whereas new things piece not so well; and, they help by their utility, yet they trouble by their inconformity; besides, they are like strangers, more admired, but less favoured. All this is true, if time stood still, which, contrariwise, moveth so round, that a froward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old times are but a scorn to the new.'"

Asgill scarcely deigns to answer the objection in an argumentative manner. He refers to many bills, which have been passed into laws after being rejected several times, and ridicules a strange saying of Fabian Philips, who called both a Registry, and stamp or paper "badges of Spanish slavery," and yet the fiscal

"badge" had been adopted without horror "by his Sacred Majesty." He then plainly tells us that those who raised the cry against innovation were those who had a private interest to leaving these things as they are; and adds,

"If the cryes of monks and friars had been regarded, we had never heard of the dissolution of monasteries; and if the clamours of Masters of Requests, Clerks, and Escheators, had prevailed, the Court of Ward and Liveries had been standing at this day."

It is to be observed that Asgill is particularly hard upon lawyers, and attributes to them motives of their own for opposing a Registry.

"Were the titles of lands once made certain (which they may be by a Registry, and no otherwise,) I know what I think of the future gains of the law. The profit of the law arises from the uncertainty of property; and therefore, as property is more reduced to a certainty, the profit of the law must be reduced with it. The *proximus ardet* will fall upon the conveyancers, and that not by altering the forms of legal conveyances, or taking them out of their hands, or putting any stop to the dealing in lands (for that will be increased,) but by exposing their manner of practice in this conveyancing part of the law. When they come to be paid, they reckon their fees by longitude and latitude. I have seen an original mortgage of one skin bred up by a scrivener (in six years) to one-and-twenty, by assigning it every year, and adding one skin to every assignment by recitals and covenants, as cows, after three years old, have one wrinkle added to each horn for every year after, which shows their age: and I am informed, that one deed of sixty skins was heaved out of a conveyancer's office the other day. At this rate, in a little time, the clyents must drive their deeds out of their lawyers' chambers in wheel-barrows."

We are not aware that this is a caricature, but we hope that the profession was not in so disgraceful a condition as this rather sour-tempered writer would make us believe; at the same time, we must say that his opponent does not repel the charges with that force which is derived from the consciousness of a good cause. At one time, indeed, he seems to admit that there is some truth in them, and finds fault with Asgill because "he should, at least in honour, have kept counsel, and not revealed the mysteries of their trade." If, however, there was some indiscretion in this proceeding, others had been guilty of it before Asgill. Phillpott, in enumerating various objections to the plan for a Registry, concludes in the following remarkable manner:—

"There is yet another objection, which (though perhaps it will not be openly owned) yet may covertly prove more obstructive than all the rest; and that is the growing students of the law (who observe with admiration the vast wealth and honour acquired by their predecessors in their functions) may see cause of despairing the like to themselves, if this

preventive remedy be set on foot. But the genuine and candid exposition of the law's use and intention forbids all contradiction of what tends to the public tranquillity and welfare, and therefore I hope there needs not much to be said in confutation of what will not be publicly asserted. And this I dare aver, that many learned lawyers have been deceived in their purchases by precedent titles of the very money which they got in controverting the like cases of their clients."

But Asgill gives a still more special and conclusive answer to this objection—that is, that the *innovation* is *the want of Registry:* "That clandestine conveyances are crept in, contrary to the intent and meaning of Parliament, and all the avowed laws and customs of the kingdom." Of this he gives a proof, which stares in the face of any man whenever he casts his eyes on a deed.

"And methinks all the old forms in the beginning of deeds show the intention of making them as public as they could be:—*Know all men by these presents;* and *To all people to whom these presents shall come.*"

He, moreover, argues the point at length, and dwells particularly on this: that the 27 H. 8. was intended to prevent secret conveyances, and that the invention of lease and release was found out to *elude* this law;—a word which did not please the author of the "Reflections on Asgill's Essay," who contended, that the statute was not *eluded*, but *avoided:* a distinction without a difference as to its effects, and as to the point in question, but of great importance to show with what good faith the opponent of Asgill proceeded. Sir M. Hale admitted

"That if all conveyances of lands were for the time to come registered, it would, in process of time, do much good, and prevent many suits and frauds, though, perchance, the present age may not find the advantage of it. And certainly it was the great design of the statute of the 27 H. 8. of Inrolments, to have brought up that method of assurances, and, had it been pursued, it had before this time been brought to great perfection, and done much of that good which is now intended by it."

Here, we may observe, that those who object to a register because its good effects would not be immediately felt, would have done so fifty years before, and have, in fact, borrowed their arguments from those very persons who, in former times, prevented a system being adopted, of which several generations would now have reaped the advantage. Asgill did not fail to take notice of this selfish and dishonest objection.

"They say a Registry signifies nothing till forty or fifty years after it is made; and so they said fifty years ago. But if, instead of that, it had been then settled, we had now received the benefit of it. And should that objection prevail in other cases, we must neither plant oaks, nor orchards, but leave off generation, because our issue arrive not at manhood till one-and-twenty."

This brings us to the third objection to a Registry: the exposing people's affairs, and the discovery of titles. Although all the writers in favour of a Registry, whose works are above quoted, were decidedly inclined to a public Registry; yet to do away with the idle fears of those *honest persons*, who *would* not hear of having their titles and true worth made known to the world, publicity was not insisted on; and, to carry the main point, it was generally agreed that the Registry should be secret. But the justice, as well as the utility, of publicity to all parties, is argued in so masterly a manner that nothing is left to desire. And, first, as to the *Discovery of Titles*, the objection is stated and answered by Asgill in the following manner:—

"All objections made against a Registry, upon account of mischiefs which may arise by discovery of titles, are not only contrary to all the avowed laws and customs of England, but to the very essence of title, and the history of conveyances.

"Some notice is essentially necessary to the title of every thing that is vendible. *To make a title is to take the property of a thing from one man, and put it into another*, of which it is necessary that other persons should have notice, as well as the parties, or else the purchaser can have no title, because there is no witness to give evidence of it, in case the seller should deny it. And as some notice is absolutely necessary to all title, so the more notice is, the better is the title: it were better for every man who is owner of an estate, that all men knew his title, and then, whenever he had occasion to dispose of his estate, there would be no further inquiry into the title of his lands than to the title of money in his possession. And as notice is thus necessary and advantageous to title, so, in the history of conveyancing, the most perfect titles are most notorious, or rather, the most notorious are most perfect."

The author of the "Reflections on Mr. Asgill's Essay" was for once of his opinion; and on the very point, too, on which he might have had the most advantageous position in making a show of resistance.

"I shall most readily grant, what has cost the author so much of his pains and learning to prove, *that the more notice, the better is the title; that as notice is advantageous to title, so, in the history of conveyancing, the most perfect titles are the most notorious; or, rather, the most notorious are the most perfect.* And this he might have illustrated, if it were ever matter of doubt to any, by instances much nearer home, and to his purpose likewise, than those he has brought from the Old and New Testament; for I agree that the ancient way of conveyancing in this kingdom was in the view of the whole country, who saw the transmutation of possession, and therefore was preferred before all secret ones.

"And for this reason, a feoffment upon the land, which is the most notorious, doth at this day exceed all other conveyances, and is more respected in law for this perfection of it. And though there are some objections drawn, I think rather from politics than law, (which, if this

author had stated, and given a clear answer to, he needed not have made those irregular and bold sallies, for want of somewhat pertinent to his assertion, and might have exercised the gallantry of his wit to better purpose against the too naked *discovery of titles*, which some imagine may prove inconvenient, and of ill consequence, for reasons of State,) yet, I confess, I am not persuaded thereby of the danger of a Registry; and had the author's argument brought with it as much light and conviction to my understanding, as there is of the contrary in this fancied objection, I should have saved my pains at this time, and relyed upon his ability to give the world satisfaction in that matter."

If the publicity of titles is admitted on both hands, the effects of it in diminishing usury, and rendering lands more valuable, as well as more available, are equally well demonstrated, whilst the ruin which is produced by secrecy is as ably pointed out. But before transcribing these arguments in favour of a public Registry, let us hear the longest and the most elaborate philippic against it, by the author of "The Pretended Perspective Glass."

"The people of England, for above eighteen years civil wars, plunderings, sequestrations, and free quarters of armies and souldiers, and above twenty years' very great and various taxes, are so universally indebted, as it may rationally be believed that the most part of them live more upon credit, than any certain or real estate or subsistence of their own: that much of the land of England, if it should be sold, will scarcely pay the debts which might be charged upon the owners thereof that our nobility and gentry, the most of which made their loyalty to their king, and their love to religion, laws and liberties of their kingdom, to be their ruin and impoverishment, will now by such a Registration be turned out of that credit which was left to support their feeble and languishing estates. That our merchants, whose trades have brought riches and plenty into their habitations, and to be inmates and dwell with them, are for the most part three parts in four in credit, and an opinion of a greater estate than they can justly call their own. And the retailers, and now more than formerly lofty shopkeepers, who have owed their low beginnings to a small stock and a great deal of credit, and gain so well by it as to afford to give 15 per cent. to any that will adventure a joint trade with them, will, when they shall be exposed to the jealous eye of the nice, over-timorous, and suspicious usurers or money lenders, be turned out of all their expectations, and made to submit to the devouring and unmerciful fangs of a statute of bankrupt, or give over their trade and be better acquainted with humility. The country farmers, when corn or cattle shall in their rates or prices fall short of their hopes to pay their landlords' rents, shall not now be able to borrow money to pay them, if their small stock or estates shall not be sufficient to endure the severity of a tell-tale registration. All trust and credit, and the faith, charity, and love of mankind one to another, whereby so many families have had their rise and foundation, and more have gained good employments, will be so enervated and weakened, as men shall be afraid of that which they needed not to have troubled themselves withall, and make them to be like empty *Banyans* and hard-

hearted *Jews* each to other. The Dutch and other nations, whose low interest heretofore brought into England some millions of sterling money, to put to a more gainful usury, will, by such a Registration, not adventure to bring over any more. . . . Such a contrivance will lay open and discover the beggary and wants of the people not only, but hinder and take away from the king his post fines and profit of alienations, amounting to about forty or fifty thousand pounds *per annum*. It will lay open and expose every man's estate to taxes and assessments, when as the registring of all mortgages and alienations of lands, can make no perfect discovery of incumbrances, without the registring of judgments, statutes, and recognizances, as well for the time past as to come.

" Such a Registration, if loyalty should be any more sequestered or oppressed, will not afford them, as it did before, any covert or succour out of such concealed parts of their estates, as their wives or friends shall be able to help them unto. And if such a misery should never be again repeated, may bring their writing and evidences to the view of such as have claims or pretences to their lands or estate, which the *Chancery* and other Courts would never compel.

" The bringing down of money to 6 per cent. hath, as frequent experiences may inform those whose estates have been sucked into a consumption by it, made too many refuse to lend money without as much brocage as hath amounted unto 8 or 10 per cent., and taught them to prey and work upon men's necessities, by denying to lend money without rent charges or annuities, which may bring them 12 or 14 per cent., and hath brought into a kind of trade and improvement of money that horrid usury and brocage now practised by taking of pawns and loan of money at 60, 40, 30, or 25 per cent., which, like locusts and caterpillars devouring every green thing, have almost covered this impoverished nation. And the hardning of men's hearts by such an inspection into all men's estates, and creating them by that means as many advantages as they please, will, when people cannot borrow moneys as formerly upon reasonable securities, cause an increase of trade of *Tally* men, who do now gain a great deal more than 100 per cent."

We do not know what to admire most in this lucubration; whether the stupidity of the writer, or his impudence. Here a man tells the world, with imperturbable coolness, that as a Registry would show to the lenders of money that the borrower has not the means of repaying it, it is therefore a most pernicious thing to propose one, for then people would no longer be taken in. What he says of the nation holds good with regard to individuals; and we only wish that those who oppose a Registry in our days, would have the candour to avow their motives for so doing, as plainly as the above writer has unwittingly done. We recommend the last part of this extract to the lovers of the usury laws, that they may take some practical hints as to the effects of them. Our reason for transcribing it was to show the absurdity of a plan proposed by the author of the " Reasons against a Registry for

Lands," &c. We shall insert it here for the amusement of our readers.

"The great wisdom of our former parliaments, perceiving the great inconveniencies arising from so high an interest of money, to the decay of trade, and sinking the prices of lands, brought it to 8 per cent., then to 6 per cent., which every one is sensible how great an advantage it hath been to trade and to every man's inheritance, and rather than to encourage the lending of money so much on land securities, it would be much more conducive to the advantage of the trade of this nation, and encreasing the great value of the lands thereof, if it may consist with the pleasure of His Most Sacred Majesty, and both houses of Parliament, rather to reduce the interest of money to 5 or 4 per cent., that it may prove more advantageous to any person to employ his money in the making of the manufactures of this kingdom, or in the exposing them, than to accept of so low an interest."

A man who argues in this manner deserves no answer; the more so when he mistates what he gives out as facts, and when he is so obstinate as to persist in his arguments after they had been foreseen and demolished by the author of the "Reasons for a Registry," whom he pretends to answer. This writer says

"The bringing down of interest will not effect this design (the advancement of trade), for where there is not a certain security either in lending money, or purchasing lands, neither the readiness in the borrower, nor the seeming advantage of a purchase, will persuade men too easily to part with that money which possibly has cost them a great deal of labour and pains in the gathering together. So that it is evident that trade and commerce cannot be carried on to the greatest advantage, without establishing such security, for the transferring of money from one hand to another, that all men, as occasion shall require, may readily and freely, without the apprehensions of being cozened and cheated, advance their money to be lent out and disposed in the way of trade Admit that the interest of money were reduced so low that men had rather buy lands than lend their money at use; yet what encouragement can men have in the prosecution thereof, where the title of such lands cannot be secured to the purchaser or lender?"

After having thus faithfully given all the arguments of any *pretended value*, against a public Registry, and the answers to it, we shall submit some additional extracts, most valuable for the facts which they contain and for the soundness of the views which they exhibit. In proceeding in their arguments these writers court objections, and answer them, with a force which must convince all but those who have determined beforehand never to be convinced. We shall begin with Phillpott, who, after alluding to the insecurity of titles, proceeds as follows:

"The terror of this mischief affrights persons who have money to lend unto those who want, and occasions the demanding of too unreasonable securities, which enforces men to engage their friends, as well

as their lands, to satisfy scrupulous lenders; and hath so far weakened credit, as that a lender in these daies will rather set at 5 per cent. to a city goldsmith, or scrivener, upon a note of his hand, than at 6 to a country gentleman, on his mortgage, judgement, or statute (and with a prudent foresight too). For in the one case (if his security proves defective) he spends perhaps all he hath to endeavour to recover of it, and (in the other) being out of hopes, he is freed from further trouble or charge, and sits down by his first loss. As the discovery of precedent incumbrances would be to the great benefit, safety, and satisfaction of purchasers and lenders; so would it prove no lesse advantageous to borrowers and sellers, by giving them credit to raise money on sale, or engagement of their lands, as occasion requires, without drawing in (and thereby often ruining) their friends to be engaged with them, or giving generall securities by judgements, statutes, and recognizances, which attach their whole estates, and make them incapable of selling or disposeing any part of it upon what emergent occasions soever.

"It is very observable how the state and condition of the seller alters the rate and quicknesse of sale. If a person reported to be indebted or engaged, offers land to sell, none will adventure to deale for feare of precedent incumbrances (unles it be upon very great advantages of an under value in regard of the danger), when as a man void of that prejudice may soone sell at the uttermost value. There are persons who drive a trade in broakage of money whose course is this. Upon the application of a borrower he finds out the money, proposes the security, and names himself for one. This double kindnesse obtaines a bountiful reward out of the summe, and likewise undoubted counter-security, not only against this engagement, but also all others in future (for my broaker intends not to desert his fresh man so). Then for his generall indempnity, he takes a lusty previous judgement of his friend (as more concealable than a statute), and upon the credit of it makes new supplies from time to time, as occasion requires. When the old debt is called in (as it must be once a yeare), he engages of new (taking up so much more money as will supply the present occasions of the borrower and reward the broaking surety). If the principall and his coengaged country sureties (these things being reciprocal betwixt them) prove slack or defective, whereby the broaking bondsman is hardly set upon, he resolves to submit to the law, and takes up his quarters in the Fleet or Marshalsea, and then to extend his judgement to gaine some part of recompence for being undone by his kindnesse to his friend, whose estate is far short to recompence his damage (although he was never worth a groat more than what he got by these means). My application is that if these judgments came to be entered, persons of subsequent concernment would come to the discovery of them, and thereby avoid, or be timely relieved against them. The difficulty to borrow money proceeds not from it's scarcity, but the diffidence of good security, for it's generally known that those who need it not, and have estates, may borrow what they please on easie tearms, when as persons in debt cannot procure it without much trouble and charge. If monyed men could safely deale in purchases or mortgages of lands (the obstruction whereof is only concealed and undiscoverable incumbrances), they would not keep their

treasure lying by them without profit to themselves, or use to the publick, but set it abroad to benefit, and none who are owners of land could want mony at any time to serve their occasions. This would promote trade and commerce between all men. The too frequent and abominable villany of forging, razing, altering, and antedating of conveyances, would be wholly prevented by the means of this Registry.

"Objections may be made, which, though weak in themselves, yet some may think them fit to receive an answer. As, 1st. The matter proposed would discover men's estates to their prejudice, their debts would be made known, and so their credit and reputation weakened, and others who desire to conceal their fortune would be discovered to the world, and thereby liable to taxes and burthensome offices, which now they avoid.

"*Answer.*—As to the first, the support of credit and repute, by having poverty undiscovered, is like the concealing of a wound till it comes to an incurable ulcer; and the effects of it can never recover the patient, but will at last destroy him, and deceive all who trust in him. As for the other, it's most just and equitable that they should bear and undergo taxes and burthens proportionable to their estates, and and not lay it on the shoulders of those who are of lesse ability.

"2 *Ob.*—It would give opportunities to pick-holes, and find out defects in men's conveyances.

"*Answer.*—1. Many persons, having once gotten a possession hold by wrong, on pretence of conveyances which they have not, occasioning many suits for discovery thereof, which need not be if the publick Registry did demonstrate it. 2. The Registry may be brief and short, setting forth only the effect of the conveyance. Besides, scarce any in these daies do sell or grant land without keeping an exact copy or counterpart, by which, defects, in case there be any, will more appear, than it can do by the Registry."

Thus far Phillpott. What follows is from the "Reasons for a Registry."

"It is said that if all men by vertue of a Registry could lend their mony upon real security, no man would lend upon personal; and consequently the merchant, who hath so many reasonable opportunities of taking up mony upon credit, would lose the convenience of serving his necessary occasions, the advantages whereof accruing to them upon their bare credit, every day's experience confirms to us how considerable the same are. But this is not the interest of the nation that the credit of tradesmen should be greater than the returns of their trades, and so much they will hardly in any case want, since it is certain that there is more mony in the nation than men have occasion to take up at interest upon landed security. And we find by experience that some men out of affection, or other particular and private respects, will lend their money in trade to their friends and relations, upon personal, when at the same time they might lend it to others upon real security; whereof we may be satisfied from hence, that in former times, when mortgages were unquestionable securities, and purchases less obnoxious to those many cheats and devices that are now too commonly put in practice concern-

ing them; yet the tradesman never wanted credit to raise mony, proportionable to the return of his trade, sufficient to serve his real and just occasions; and if men's credit be but proportionable to their industry and stock, they may carry on a much more certain, though perhaps a less extravagant trade; and possibly, at this day, the extraordinary credit of some, who have taken up more mony at use than ever they intended to pay, may have made others fare the worse in point of credit, who have had just and reasonable occasions of taking up mony, and would have been truly punctual and careful in the repayment thereof.

"Some men are likewise apprehensive that it would be a great prejudice to the country gentlemen, by discovering what mortgages and other incumbrances are chargeable upon their estates, by the discredit whereof they are rendered uncapable of several advantages, which otherwise they might enjoy. But surely this is a great mistake as to all honest gentlemen: (and 'tis to be hoped the law will make but one sort of provision for knaves) for the reputation of a country gentleman being in debt is at this day so fatal upon him from the uncertain conjecture to be made, how far that debt may extend, that though in truth it may be but for a very indifferent sum of money, that it shall be difficult for such a person to raise five hundred pounds, that in reality may be able and sufficient to give security for five thousand pounds, by reason of the great suspicion men have over the integrity of any man that is never so little in debt; an inconvenience which has no small misfortunes attending it; since it is from it that procuration and continuation is so frequently paid, so many journeys, expence of time and charges in enquiring after the reputation of the parties, in being satisfied of titles produced and settling of writing by counsel, in being subject to all the severe covenants, conditions and collateral securities that the wit of a man can impose upon them, to which may be added the difficulty of redeeming a forfeited mortgage without a *Chancery* suit, or two, and the interest in the mean time shall swell up the debt, sufficient to balance the security. Now if the excellent temper and the invincible patience, not to say infatuations, of such worthy gentlemen can support them to undergo and acquiesce in such incomparable hardships, I must needs pronounce them happy men; or otherwise I cannot believe they can too highly esteem the advantages of a Registry, which not only supplies those so many defects of them, but in a greater respect may advance their particular interests; for from hence it might happen that lands would not be so great a drug, if they might but easily and safely be transferred from one to another, because many, from the health and tranquillity of a country life, would bestow their money and time upon lands, and the improvement thereof, who at present are forced to imploy their effects in another current, for want of due opportunity to improve the same in the country; and besides, a Registry would have this peculiar advantage, to prevent the forging of deeds, which I refer to common experience how fatal it hath been to many estates.

"I have been more particular in these instances relating to country gentlemen, because I fear the misapprehensions which they have had over the conveniencies or inconveniencies of a Registry, hath been the great obstruction hitherto of putting the same in practice.

"A third care remains to be taken of those that lend their mony out

at interest, who can ill indure that all mortgages being registered, it should thereby be known what mony is constantly put out at interest, and the lenders thereof become obnoxious to contribute towards all publick charges; and certainly 'tis but equal justice they should, for if a Registry be more particularly introduced for the security and encouragement of those who have occasion to dispose their mony at interest, they may well be contented to pay a little for their convenience. But to make the accommodation more universal than so, we may consider in this case (i. e. by adopting a *secret* Registry) that there is no danger of such terrible discoveries."

Squire E. B., in his "Proposal for the erecting of County Registers," begins his pamphlet with such views on usury and usurers, as to establish at once his superior claims to attention. He says:

"A motion being made in the House of Commons, in the reign of Queen Elizabeth, for leave to bring in a bill to prohibit usury, a great statesman, then in the House, opposed it, and concluded his arguments for the continuance of it with this memorable aphorism—*Let any man show me a country without usury, and I will show him one without trade or riches.* Than which none of the mathematical principles are more certain or self-evident.

"True it is in the mean time, that no sort of men are, or deserve to be, more odious than the *griping usurer;* but then it is the abuse of the thing that makes him so. Let him take a reasonable interest for his money, and treat the men he deals with fairly and upon the square, and no man deserves more love than he. But this is so hard to be expected from that sort of men, that they are feared and suspected before they are guilty of any ill thing. The trust they give is too often abused, and that often makes them think of taking reprisals upon the rest of mankind that have not injured them; and the distrust they show is in some sort justified by the ill actions of needy and designing men, that appear what they are not, both for colour and substance, honesty and ability....

"The way between these rocks on the right and left hand is the opening *C unty Registers*..... The method I propose is none of my invention: one Mr. *Yarrington*, about twenty years agone, first offered it to the consideration of the nation; and since that time it has ever been debated: desired by all that had need of it, and opposed by the rest upon very different grounds and reasons without doubt, but those alledged publickly none of the best; and, in truth, it has some inconveniences, which I shall mention, perhaps, in the close of this paper."

After all that we have transcribed, it will seem useless to add more. Asgill, however, in his "Reply to the Reflections on his Essay," adds an argument, both so new and so forcible, that we need not apologise for giving it a place.

"The apprehension of frauds in titles draws a suspicion upon good titles as well as bad, and consequently doth depreciate the value of lands in general..... Suppose there were the like hazards in the titles of stock as in the title of lands; *viz.* that this stock were transferrable at

large out of a Registry, and that every such particular transfer, together with general incumbrances of judgments, statutes, &c. were to affect it as they do lands, and that the conveyances of it were to be made by lawyers, with recitals *and whereas's*, &c. showing all the mean assignements through which they came, and a set of covenants afterwards for being lawfully seized, &c., whether this very alteration of the title, without anything else, would not of itself depreciate the value of stock 20 per cent.; and yet, perhaps, there might not be one false title in a hundred transferrs. Why then if it be supposed that the changing of the title of lands to the title of stock would depreciate it so much, I can't think but the changing the title of stock to the title of lands would advance much the value of them; and this title to stock is nothing but a registry. To say that a registry of lands may not be made as perfect, and the title thereof as readily transferrable as stock, is to say that the same thing can't be done within our Inns of Court as is at *Grocer's Hall* or the *East India House*."

We shall conclude with the words of Squire E. B. as to the effects of a Registry, and to the real and great inconveniences which will follow from its adoption.

"The effects which would follow would, amongst others, be these:—It would make the titles of freehold estates as certain as that of the copyholds. 2d. It would prevent frauds in buying and selling, borrowing and lending. . . . This would certainly lower the interest of money, encrease trade and husbandry. . . .

"There can nothing be so wisely contrived but it will be attended with some inconvenience, and I will most readily grant this hath many and great inconveniences which follow upon the settling of it, the prospect of which hath hitherto prevented the obtaining this desired liberty," (*viz.* the liberty of registering; according to the author's plan it is to be optional).

"1. This will prevent great number of lawsuits, for which there will then be no occasion, frequent fines, procuration and continuation money; which will bring great loss to the lawyers and money-scriveners, and to some of the most thriving usurers.

"2. It will discover those men that have mortgaged their lands two, three, or more times over, and, perhaps, for more than they are worth.

"3. It will reduce the greater usurers to moderation and fair dealings.

"I do, therefore, expect all these men will oppose it to the utmost, as it is their interest to do; for though they cannot take away the integrity of an honest man, yet great care is to be taken it may not be known which are such; for when *knaves* are once detected they are undone, and by them the lawyer, money-scrivener, &c. get all their wealth."

Art. III.—ON THE PUNISHMENT OF DEATH.

The object of the following observations, is, to ascertain to what extent, in the present condition of society, the use of death, as a punishment, can be deemed beneficial, and therefore justifiable. The discussion of this question, from various causes, which will appear in the course of the succeeding remarks, is now peculiarly pertinent. The importance of the subject, and the necessity of thoroughly understanding it, will prove, it is hoped, a valid apology for the length and necessarily unattractive form of the investigation itself.

It is requisite to bear in mind that the sole end of punishment is prevention of crime. Barbarians seek to gratify their spirit of vengeance by the infliction of pain on the offender: a civilized legislature desires no such satisfaction. To preserve the peaceful enjoyment of the rights conferred by the law, and to insure the fulfilment of the obligations which it imposes, in other words, to prevent an infringement of the law, is the only end proposed in determining on the use of punishment.

Thus, then, before the propriety of using punishment at all, or of any one species of punishment in particular can be ascertained, the other means to the same end possessed by the legislature must be known and appreciated. Every punishment is an evil. To justify its application, we must be sure that no other less evil, and yet efficient means to obtain the end proposed to be obtained by punishment, exist. The rule that has been applied to determine the utility of different punishments may be, and ought to be, applied to all means of prevention.

"Punishments," says Mr. Mill, "should be proportioned, not to the greatness of the crime, that is, the quantity of suffering it produces, but solely to the difficulty of creating an adequate motive to abstain from it. Thus, if a fine of one shilling created a sufficient motive to abstain from the crime of murder, the fine of one shilling would be all the punishment which ought to exist."*

So if the same end could be attained by a means of prevention inflicting no pain whatever, no punishment of any kind ought to exist. And no wise, no honest legislator would consider that he had performed his duty if he employed the painful means, before those working no evil had been tried and found inefficient.

Of the whole means of prevention which are within the power of the legislator, the following seem to be the most important:

1. The creation of such habits and associations, in other words, the forming such a state of mind, as would induce the individual to view criminal acts with repugnance, and give him fortitude to

* History of British India, b. 2. c. ii

resist temptation to commit them. Again, in other words, EDUCATION.

2. The creating difficulties to the very perpetration of offences; in other words, a well organized PREVENTIVE POLICE.

3. Supposing the offence committed under the expectation of gain, or other advantage, the adoption of methods to diminish and destroy that gain. This also forms part of the business of POLICE.

4. Supposing the immediate object of gain or other advantage to be obtained, the adoption of methods of diminishing the chances of impunity by increasing the chances of detection and conviction. This is partly the business of POLICE, partly of JUDICATURE.

5. Supposing the offender convicted, the infliction on him, of pain, whether mental or corporeal, as a consequence of his offence; in other words, PUNISHMENT.

From this statement it is evident, that of the means of prevention within the power of the legislator, *punishment* forms a small, and indeed, comparatively, an insignificant portion; and, also, that while thus comparatively insignificant, it inflicts more evil, in order to obtain the end desired, than all the other means combined. It unfortunately happens, however, to be most easy of application. To educate the people, to form an efficient police and judicature, require skill, patience, and disinterestedness. To punish needs only force and will. The legislators of mankind seldom being adequately possessed of the first set of qualities, have usually employed the means which brute force afforded; ever being more ready to use rude means of coercion, thus inflicting pain on others, than to subject themselves to the trouble of investigation, and to the labour of acquiring knowledge.

It is not exactly within the scope of the present article to describe more in detail the importance of education, police, and judicature. By the legislator, however, these subjects must soon be thoroughly examined—the public are rapidly becoming more and more averse to painful punishments of every description; and every day brings fresh proof, that unless the law be amended it will be defied and hated, while the criminals who suffer under its enactments will become objects of interest and compassion. A great plan of national education, an education that will supersede the gibbet and the treadmill, must soon be entertained by the rulers of this country. Instead of gaols we must have schools; and the constable, the magistrate, the gaoler, the hangman, must give place to the schoolmaster. That some plan to this end has never yet been entertained by the government of a country, believing itself at the head of the civilized world, is a matter worthy of grave consideration. Men really benevolent, oftentimes highly

instructed, have permitted a sanguinary code to exist, have seen a harsh execution of its dictates, and have yet looked on in idleness and apathy. Why is this? Why? Because men, however good, however wise, cannot be safely trusted with irresponsible power. No immediate self-interest pressed this subject upon the attention of our legislators. *They* are contented, *they* are safe under the present law. It is the mass of the people only that are wretched. But this wretchedness finds no echo within the walls of Parliament, else would not the eight hundred millions that have been for ever wasted in the destruction of human life, and the devastation of the fairest portions of the universe, have been employed in beneficial schemes for the amelioration of the people? Eight hundred millions of money would have covered this country with schools, have endowed every needful seminary; have permanently established a judicature that would always have been active, and have extended over every part of the country, making law cheap and just. A police, perfect for its purpose, might also have been framed on the same large and liberal footing.

Let it be supposed, however, that all these preliminary steps had been taken, and that punishment is still found to be absolutely necessary. It remains for us to inquire whether death possesses the qualities requisite to render punishment efficacious: whether a more efficient, as well as a less cruel mode, cannot be discovered of attaining the desired end.

The *end* of punishment is prevention: prevention in two ways: we desire by its example to check society at large; and, by the remembrance of it, to reform, or, through physical incapability, to restrain the criminal himself.

The efficiency of a punishment to these two purposes depends:

1. Upon the opinion which the community entertain as to the *certainty* of its infliction.

2. Upon the conception which they form of the degree of misery attendant upon it when inflicted.

3. Upon the mode in which the punishment affects the morality of the people, through the medium of their sympathies.

4. and lastly, Upon the power which the punishment itself possesses of reforming the criminal, or of rendering him physically incapable of mischief.

1. If a punishment be certain; if, while it inflicts little absolute physical pain upon the criminal himself, it exhibits to the people a species of suffering which they dread to undergo; if, while it punishes, it reforms the offender, engages the feelings of the people on the side of justice, and strengthens their veneration for the safeguard of the law, and if, at any time, it be improperly inflicted, the mischief it effects can be easily repaired; then, in-

deed, it may be said to possess every quality requisite for a perfect punishment. Let us endeavour to learn the degree in which the punishment of death, in the present state of the people, approximates to this perfection.

1. The first grand distinguishing particular respecting the infliction of death as a punishment, is, that in a vast majority of cases wherein the law has determined to employ it, its infliction, from a variety of causes, is rendered in the highest degree *uncertain.*

To a complete attainment of the legislator's object, when he awards a punishment, a willing judge is absolutely requisite. A judge who repugns the law he administers, takes every opportunity of obstructing its operation, and by rendering doubtful the infliction of the penalties it awards, destroys, or at least diminishes its efficiency. The same observation is applicable to an unwilling police, and unwilling prosecutors.

In England not only are the people, to a most important extent, judges; but they have hitherto acted, and must always to a certain degree act, in the character of police and prosecutors. Before any law can be made efficient here, therefore, it must be such as the people believe they can conscientiously assist.

To all who have the slightest knowledge of the feelings of the people it is a matter of notoriety, that there is a strong and constantly increasing opposition to the infliction of capital punishments in all but a very small number of cases. The daily improving cultivation of the great mass of the population, and the consequent softening of their manners, have contributed mainly to the existing feelings on the subject. True it is, that careful observations and accurate deductions have had little part in its creation; that vague feelings of humanity often supply the place of a more safe and steady guide; but still, whatever be the cause, the opinion that capital punishment ought seldom to be inflicted is hourly gaining ground; and whatever may be its correctness, it necessarily influences the administration of the law, and renders it in a high degree inefficient, by rendering uncertain the infliction of the penalties it awards.

Excepting in the cases of murder and crimes attended with grievous violence, the public consider capital punishment utterly unjustifiable; and they who watch the administration of the law, well know how constantly and how successfully is the struggle maintained, to rescue from the power of the law all other offenders who stand in danger of that punishment. The most remarkable illustration of this assertion has been afforded by the cases of forgery.* And these cases being among the most striking we

* The present article was written before the passing of Sir T. Denman's Act, but

can obtain, we shall, for the most part, here employ them as examples of the principles we are endeavouring to support.

Forgery is commonly said not *to deserve* death. This expression marks the reigning opinion; at the same time it proves that opinion to be grounded on erroneous reasons. The minds of a very large majority of the people revolt at the idea of having a fellow creature deprived of life, because he may have attempted illegally to obtain another man's property. They deem and call it legal murder? and not only do they themselves feel repugnance to the act, but they well know that their neighbours would hold them in detestation should they commit it. This feeling is remarkably manifested in all trials for forgery. The injured man, he whose property has been attacked, and who comes forward in the character of a witness to inculpate him who attacked it, is subject to bitter and uncontroulable feelings of hatred and disgust from the major part of the audience at those trials. Mr. Hoare before a committee of the House of Commons thus expressed part of the feelings of his class on the subject.

"In the first instance there are their own feelings; their unwillingness for the sake of property, to take away the life of a fellow creature; added to their unwillingness are the intercessions which are invariably made by the friends and connexions of the bankers; for the individuals committing forgeries are generally well known to the parties concerned, and though they may feel comparatively little reluctance in punishing strangers with death, yet when they are in the habits of intercourse with the friends of the individual who has committed the offence, it becomes far more painful." *

The case of the quaker Hunton, was a strong illustration of our observations. The highly respectable individual upon whom the forgery had been committed was subjected to all sorts of painful and unjust insinuations, because he prosecuted the miserable culprit; and fearlessly came forward as a witness against him. The public caught at every circumstance that could possibly be tortured into even the semblance of extenuation; and in their humane eagerness to rescue the prisoner, were unjust to the honest man whom he had injured. Had the sum, in this case, been a small one, or had the person defrauded been less known and esteemed, less firm, less capable by his situation of braving obloquy, the offender would infallibly have escaped. Other and late cases must be in the recollection of every one, wherein such was the actual result. Some there were in which the person defrauded absolutely assisted the escape of the criminal.

the law, as it formerly stood, still affords a proper illustration of the writer's argument. It must be remembered also, that the punishment of death for forgery, is not, in all cases, abolished.—Ed.

* Report on the Criminal Law, p. 148.

because he felt he could not concientiously contribute towards his death. As examples have usually more force than general statements, we will cite one other case reported to us, bearing every mark of truth, and which moreover contains an apt illustration of another of the various modes by which impunity is created, through the use of what the people deem excessive punishment. The daughter of a respectable tradesman had the misfortune to marry a worthless fellow, possessing no honest means of livelihood, nor the desire to obtain one. This man, when his necessities become urgent, regularly forges a bill upon his father-in-law, who as regularly pays it. The injured father gives the following reason for his conduct. "Were I," he says, "to hesitate, or refuse to pay the bill, an inquiry would necessarily take place, and the fellow would be infallibly hanged. I might (we use his own expression) as well put a halter round the neck of my daughter. *Were transportation, or any less punishment awarded to the offence, I should not one instant hesitate in bringing him to justice.*"

In by far the greater number of cases, moreover, the crime of forging is committed by persons under peculiar circumstances of temptation, or who have no intention of ultimately defrauding. They hope, at some future day, to be able to return the money, their own exigencies having been relieved without injury to any one: the money they obtain they intend to borrow, not to steal. The persons whose money is taken know that if they attempt to bring the offender to justice, they condemn to certain death a fellow creature, whose crime may, perchance, be rather evidence of misfortune than depravity. Is it wonderful that they should shrink from assisting the execution of a law violating, in their opinion, the most sacred rules of morality? And men sympathize with their honest feeling of repugnance, though they acknowledge it to be mischievously erroneous. Erroneous or not, however, it influences their conduct: they defeat the efficiency of the law, because they deem it unjust—they render the infliction of the punishment *uncertain*, because that punishment is death.

Again, as the opinion still exists that punishment ought to bear an immediate relation to the heinousness of the crime, the people are led to oppose a law which awards the same dreadful punishment to acts materially different in the extent of mischief they produce. This undistinguishing severity shocks the prevailing feelings respecting justice; and by leading men to forego all attempts to bring the minor offenders to punishment, generates *uncertainty*, and, by necessary consequence, leads to an increase of crime.

Such is the influence of this punishment on the conduct of the people when acting as prosecutors and witnesses. The effect is

equally pernicious when they act in the capacity of judges. The same incorrect notions respecting justice which deter them from being active agents in originating prosecutions, mislead them when called upon to determine upon the truth and correctness of prosecutions originated by others. They watch with partial minds the evidence adduced; they seek with eagerness for every possible means of rescuing the prisoner, and view with jealousy every attempt to inculpate or condemn him: and, at length, if the evidence cannot be resisted, if the truth be too painfully manifest, and the inexorable law must be enforced, the jury surrenders up the victim with pressing entreaties for mercy. These entreaties are often seconded by the public at large, and are often successful. Thus uncertainty attends every stage of the procedure. The prosecutor, the witnesses, the jury, the judge, and the minister all in some degree, from the same cause, contribute, more or less, to produce it, and thus to hold out impunity for crime.

The unwillingness of the people to aid in the administration of the law is still further increased by the consciousness, that if through these efforts the punishment should light upon an innocent person, the mischief is irreparable. The influence of this feeling in preventing the conviction of offenders, must strike even the most careless observer. Evidence which carries conviction to the mind of the public, which convinces the very jurymen themselves, is constantly passed over, and because absolute certainty cannot be attained, the most abandoned criminals often escape.* And if this be the consequence, as it sometimes is, in cases of the most dreadful atrocity, how much must the chances of escape increase in the long list of minor offences wherein the feelings of the jury are less strongly directed against the accused, wherein sometimes, as in forgery, they are absolutely enlisted on his side?

If we pass from the cases of forgery which we have selected as an illustration, and bearing in mind the conclusions to which that illustration points, consider the extent of crime which they necessarily affect, the evil will assume a magnitude absolutely appalling. To enumerate the various offences for which death is awarded by our law is here completely impossible. The major part of our readers, however, must have some, if not a very accurate conception of the catalogue, and can pretty fairly estimate the mass of crime which it includes; and when they recollect, that with a very few exceptions, the same uncertainty in the punishment, and all the attendant evils of that uncertainty are

* The case of the wretch who was accused of the murder of Mrs. Jelf must be familiar to every one.

created, they can hardly avoid assenting to the conclusion that the punishment of death, so far from increasing our security by holding out the expectation of an appalling sentence to the criminal, does, in fact, increase his audacity by diminishing the chances of his receiving any punishment whatsoever.

One answer to these arguments, as it regards specifically the matter of certainty, we will notice here. It is asserted that since death is seldom inflicted in any but atrocious cases of criminality, advantage is derived by leaving a species of discretionary power in the hands of the executive. To this we answer, first, in some cases, as forgery and arson, a milder punishment is seldom inflicted; but in many others, as burglary and highway robbery, the severest sentence is often carried into effect: that to those cases, consequently, the present argument cannot extend: secondly, that in those cases in which the practice does occur, it is well known that nothing like certainty as to the result ever exists. Both the prosecutor and the jury are in some degree of doubt, oftentimes to an extent materially to influence the conduct of both; and, in all cases, to influence it in some measure. A striking proof of the uncertainty of the punishment may be obtained by reading over the trials at the Old Bailey, and endeavouring to foretell what criminals will receive the severest punishment of the law. Let any one compare his conjectures with the actual results, and he will be no longer sceptical respecting the uncertainty which exists, even amongst the persons most conversant with these proceedings. The determinations of those whose duty it is to select the objects for capital punishments, frequently appear as if they were formed upon the cast of a die—so slight is the attention paid to the degree of guilt in the criminals from whom these selections are made.

The effect of this uncertainty on the prosecutors and the witnesses on the one side, and the criminals on the other, is widely different. The prosecutors and witnesses have a strong desire that the favourable event should occur to the criminal whom they may contribute to convict; there is a certain chance that it will not occur: and this chance they necessarily exaggerate—and for this reason; they must go through an *unpleasant* duty before they can run risk of its occurring. A desire to have the criminal punished urges them on: this is usually a short-lived feeling in the case of the minor offences, under any circumstances, and when the punishment of death is the consequence of their convicting the offender, it is almost immediately overpowered by compassion, and moral repugnance to the act. They waver then between the feelings of duty and anger, which impel them to bring a criminal to justice, and the feelings of compassion and repugnance arising from the fear lest the criminal should be too severely punished.

While thus wavering they know that all the trouble, expense, and anxiety attendant on prosecutions, await them if they determine to punish the offender; this feeling of personal inconvenience has but too powerful an influence, and where a shadow of doubt exists almost invariably turns the balance. If we now turn to the criminal, the effects of this uncertainty will be seen to be equally striking. An undue confidence in our own good fortune is so prevailing a sentiment of the human mind, one so constantly observed, that it is but short-sighted legislation that would overlook so powerful a source of human action. By this the criminal is led to calculate, that in the lottery of punishment the favourable chances *will* occur: and, for this reason, commits the desired act which is immediate and certain, unheeding the distant risk of its punishment. The immediate object which he has in view by committing the crime, is the satisfaction of some desire, oftentimes of the most pressing and painful description—the alleviation of hunger, or thirst, or cold, the gratification of habits, infused by early associations, which are scarcely less strong, craving, and imperious. Against this desire is ranged the dread of punishment. His mind, when contemplating the criminal act, immediately runs over the incidents connected with that punishment, and seizes with avidity, and dwells constantly upon the chances of escape. Immediate pain is the consequence of resisting immediate pleasure, or immediate relief is the consequence of yielding to his desire. There exists then a strong inclination towards the latter course; and one powerful means of strengthening this inclination is, to exaggerate the chances of avoiding punishment. That this is the fact, no one who knows any thing of human nature will pretend to deny. Why the different results, in the two cases, take place, we need not now proceed to inquire; we have pursued the analysis far enough already for our present practical purpose. And we are necessarily driven to the conclusion that the uncertainty of the criminal's escape deters the prosecutors from bringing the criminals to justice, while it urges the criminal to commit the act by which he becomes amenable to punishment.*

In those cases where the conduct of the executive authority is inflexible, the advantages proposed to be derived from intrusting it with discretionary power, do not exist; in those cases where the discretionary power is exercised, *uncertainty* and all the evils

* In 1826 twelve hundred persons were condemned to death: fifty-seven were executed. How many of the prosecutors in these cases, upon returning to their homes from the trial, felt certain of the fate of the criminals whom they had contributed to convict? Let any man place himself in the same situation, let him carefully contemplate it as here placed before him, and then let him decide as to the certainty either of escape or detection.

attendant on that uncertainty, are the consequence. Why then should this power be permitted to remain? The proper course to pursue would seem to be, to affix such punishments to the various crimes as the people might conscientiously aid in inflicting. Prosecutors would then cheerfully perform the duty of bringing criminals to justice; and the hopes of impunity would no longer assist in leading men to crime. It would be better to incur the risk of subjecting a hardened criminal to a punishment somewhat too mild, than by retaining a power to punish him arbitrarily, to create thousands of criminals. But if this argument in favour of intrusting the executive authority with this discretionary power be conclusive, in those cases to which the law now affixes the punishment of death, why stop here? Why not push it to its fullest extent? and what reasons can be urged to show that if the argument be valid here, death ought not to be awarded to every offence of whatsoever description. If cases arise in which the extreme punishment should be inflicted, the administrative branch of the government would then have the power to inflict it; and when no such necessity existed, the law would be changed at the discretion of those appointed for the purpose of deciding. This is a consequence probably but little suspected by the advocates for this discretionary power, and which we conceive no person would be mad enough to desire. We are unable, however, to perceive how the consequence can be avoided, if the previous argument be allowed.

2. However paradoxical the assertion may appear, it is nevertheless the result of careful observation, that death does not hold out the expectation of that sort of evil which is best calculated to strike salutary terror into the minds of persons contemplating the commission of crime. That, however appalling and striking it may at the first glance appear, it is in a short time easily braved, and, if not immediately impending, considered almost with indifference.

The evil which a punishment inflicts is a compound of mental and corporal suffering; and the beneficial dread to be created by it depends not solely nor mainly upon the intensity of the bodily pain, but may be made to result in a much higher degree, by means which produce comparatively trifling physical misery.

In the ordinary course of humanity, men suppose that they are destined to arrive at a moderate old age, and calculate accordingly. In the quiet life of a peaceable citizen there is a certain number of chances against this event, and this number men are found to increase upon a very small temptation. The soldier who enlists for a few pounds is seldom very solicitous respecting the decrease in his chances of longevity. The sailor, the miner, the mason, all yield to necessity, and think themselves rewarded

for their increased risk, by an increase in the wages of their labour. And this is peculiarly striking in those employments, such as the use of quicksilver, and the manufacture of various preparations of lead, which invariably lead to premature death or incurable disease. The criminal often does the same, and runs the risk of having his life cut short by the law, with the same sort of recklessness that attends the sailor and the soldier in their calculations of the dangers of flood and field. His evil chances are scarcely more numerous, and his temptation is equally strong. True it is, that ignominy awaits him, and this ignominy is the sole increase in the deterring influences to which he is subjected; which influence might be rendered much more efficient, were death not its accompaniment.

The mere corporeal pain of dying, whenever it may have to be undergone, in the way in which capital punishment is now inflicted, is too momentary to be a powerful deterrer. To the soldier, the idea of having his head taken off by a cannon ball has little of an alarming character. What he dreads is not the sudden extinction of life, but the long agony of a wound. In the first instance, a moment, and all is over; in the latter, hours, perhaps months of misery are the result. The pains attendant upon execution are almost equally short lived, and are treated with equal indifference.

All that the public perceive of the pain attendant upon the punishment of death is included within the few moments passed in carrying it into execution. The unhappy offender appears before the eyes of the multitude—in one short instant he is deprived of feeling and of life, and the spectacle and the misery have passed away. In the long vista of human life this painful moment becomes an almost imperceptible point, and the value of the space of time thus lost by the criminal, in consequence of this somewhat early hastening of his necessary fate, is easily overbalanced by the various temptations to crime. That by the criminals who infest society, this catastrophe is viewed with indifference, is but too notorious. Of the vast multitudes that are spectators at an execution, a large portion are persons guilty of crimes to which the law awards the same punishment. The possibility of the evil has entered into their calculations, and they coolly await the result. "Les criminels ont aussi leur philosophie; dans les chances de leur destinée ils calculent froidement ce qu'ils appellent le mauvais quart d'heure, et plus d'une fois sur l'échafaud ce secret leur est échappé; non disaient-ils, l'idée de la potence ne nous a jamais detournés d'un seul crime; la roue seule étonnait notre farouche courage." (Rapport.) "I once saw a man," said a witness before a committee of the House of Commons, "for whom I had been concerned, the day

before his execution, and on offering him condolence and expressing my concern at his situation, he replied, with an air of indifference, " Players at bowls must expect rubbers:" and this man I heard say that " it was only a few minutes, a kick and a struggle, and all was over." One reason of this indifference is that the punishment is but of a few minutes' continuance. The pang, however great, is but the pang of an instant; and compared with the thousand pressing temptations to hazard the chance of its infliction, sinks into absolute insignificance.

It is a grand characteristic mark of an ill-regulated mind, to indulge in overweening expectations concerning the future; and to exaggerate the good and evil which the present affords. But the minds of those on whom punishment is to act, are just the worst regulated minds of the community. Every possible means, therefore, consistent with the improvement of the moral character of the people, ought to be employed, to diminish the worth of their criminal enjoyments, and to bring vividly before their minds the painful consequences of their evil actions. In how great a degree *certainty* is necessary to this end we have already explained; we are now considering the means of bringing the punishment constantly before the mind of the criminal, and of giving it characteristics which may render the contemplation of it exquisitely painful. A punishment which consists of *one* terrible pang is not of this description. A large portion of the criminals, though they be necessarily men of firm, undaunted courage, of a stamp to bear up against, and finally contemn the dread of death, would nevertheless shrink from a trial which required not *one* firm resolve, but long and unwearied patience; which at no one time called for a great exhibition of courage before a sympathizing or possibly an admiring audience, but which coerced them day after day, month after month: which spread over a long space of time, not merely cut short the pleasures which life had hitherto afforded, but imposed a long train of privations yet unexperienced; a punishment which by its tedious monotony, and long-drawn-out suffering, would wear down the spirit, and by its dull and tiresome oppression would excite no enthusiasm, and call for no heroism. The hardy villain who now makes his possible punishment a matter of boasting, and almost of triumph, would tremble at the thought of the desolating misery of solitary confinement. Take a soldier condemned for a month to the black hole, ask him whether he will undergo his punishment or form one of a storming party. Not one in ten thousand but would choose the latter alternative. His probability of escape is however infinitely less than that of the criminal; and should he suffer, there are many chances that his death will be attended with excruciating agony. No one believes that crime would be

repressed amongst the soldiery, by threatening them with being dispatched against the enemy in case they transgressed the law. The drunken reprobate whom the black hole will keep sober, would be eternally in a state of intoxication did he fear no other punishment than an attack upon the enemy. Thus it is with the criminal whom the law punishes with death; a solitary cell would, we firmly believe, check him in his career of villainy, while death is neglected and forgotten.

Added to this briefness of the misery created by the punishment, as a circumstance diminishing its efficiency, is the favourable sympathy of the people with those who suffer the extreme penalty of the law. A sort of heroic feeling is connected with the fearlessness exhibited in braving death. This fearlessness is dignified by the name of courage, and assumes in the eyes of the community at large the appearance of a virtue. The schoolboy who bears the punishment of flogging, acquires in the same manner the reputation of courage, and the esteem or applause of his schoolfellows. The selfsame boy, who, if subjected to a less severe and apparently less appalling punishment, would sink under the trial, is here supported and rewarded by the sympathy of his fellows. He would no longer have the opportunity of being considered a hero, and, unable to exhibit his bastard virtue, would fear and obey the law. In the case of Thurtell, a striking instance was given of the mode in which the courage manifested by a criminal may throw a sort of glory around him, and support him through the misery of punishment. Thurtell was a man of undaunted courage; his deportment throughout his trial, and at his execution, was collected and cool, without the appearance of effort, and that to a degree absolutely wonderful. A sudden and complete revolution of feeling among the people was the consequence: and he died amidst the lamentations of thousands, more honored for his courage than abhorred for the atrocious murder he had committed. To meet death under such circumstances was not difficult. But had he been subjected to a less dreadful punishment, this romance could not have attended him: opprobrium and shame would have been his lot. Unable by exhibiting courage to appear a hero, he would have been truly judged, and deemed an execrable villain.*

3. While by the barbarity of the punishment its force merely as a punishment is materially diminished, a still greater mischief is produced by the same cause, namely, a general weakening and *distortion* of the moral feelings of the community at large.

* Mr. Livingston, in his project of a penal code, gives, at pages 51 and 52, a remarkable instance of a similar effect produced by the same cause. We refer our readers to that work.

To make men indifferent in any case to taking away the life of a fellow creature, no matter by what means the indifference is created, is *pro tanto* to brutalize them. But to raise this feeling of indifference in instances where no necessity to inflict death is believed to exist, is to generate the most immoral state of mind into which a human being can well be driven. There are circumstances in life which render it impossible wholly to avoid the painful and demoralizing trial of seeing human beings subjected to pain at the hands of their fellow creatures; but a wise legislator endeavours to render the cases, so far as he is concerned, the fewest possible, and when the necessity of subjecting the people to the influence of such a spectacle cannot be avoided, he seeks for that punishment which, while it is efficient, exhibits the least appalling examples of misery. For this reason, if for no other, a wise and humane law-giver would abstain from awarding the ignominious and shocking punishment of flogging. For this, if for no other reason, the punishment of death would be erased from his catalogue of expedients.

In those cases where the feelings of the people are against the criminal, the sight of his misery adds to, and fosters that spirit of ferocious vengeance which it ought to be the object of the legislator to subdue. The exulting crowd at Edinburgh who beheld the execution of Burke, and glutted their vengeance by greedily contemplating his sufferings (exhibiting the spectacle of a band of savages, rather than of civilized citizens), can hardly be supposed to have had their ferocity softened by viewing the exit of the wretched offender. The horrid glee of the frantic crowd, the mutual cheering on of each other to a loud and furious manifestation of joy, the sight of thousands expressing the same feeling, must have had a powerful effect in permanently disjoining those feelings that ought to be inseparably united; the feeling of compassion at the conception of misery suffered by a fellow creature. Virtuous habits are not so easily created that we can afford to put them into danger; compassion and tenderness are not so common that we may lightly be justified in risking their destruction. In the very instance before us, what was the after conduct of the populace? They sought with absolute fury after the accomplice of Burke in his horrible murders, and would have torn him limb from limb, had the wretch fallen into their power. Great skill and inflexibility, both on the part of the judges and the police, were required to rescue him from the pursuit of the crowd. Loud and reiterated were the demands of the people, that the government should break faith with him, and untiring were their efforts to seize him, when they discovered that he had completely escaped the grasp of the law. When these efforts also failed, the public papers with a savage, and with what, were

the occasion less grave, would have been deemed an almost ludicrous spirit of vengeance, exhorted the miserable criminal to rid the earth of his presence by self-destruction.

The high tone of morality which the following observations evince, the touching sample they afford of humanity presiding at the councils of a Legislature, as well as their intrinsic truth and pertinence, will form an ample apology for their insertion here:

"Considérez cette foule immense que l'espoir d'une exécution appelle dans la place publique; quel est le sentiment que l'y conduit? Est-ce le désir de contempler la vengeance de la loi, et en voyant tomber sa victime de se pénétrer d'une religieuse horreur pour le crime? Le bon citoyen est-il meilleur ce jour-là en regagnant sa demeure? L'homme pervers abjure-t-il le complot qu'il méditait? Non, Messieurs, ce n'est pas à un exemple, c'est à un spectacle que tout ce peuple accourt; une curiosité cruelle l'y invite; cette vue flatte et entretient dans son âme une disposition immorale et farouche: souvent le même crime pour lequel l'échafaud est dressé trouve des imitateurs au moment ou le condamné subit sa peine, et plus d'une fois on volait dans la place publique au milieu de la foule entassé pour voir pendre un voleur.

"Malheur à la société, si dans cette multitude qui contemple avidement une exécution, il se trouve un de ces êtres disposés au crime par la perversité de leurs penchans! Son instinct, semblable à celui des animaux féroces, n'attend peut-être que la vue du sang pour s'éveiller, et déjà son âme est endurcie au meurtre, à l'instant où il quitte l'enceinte tempée par le sang que le glaive des lois a versé.*

"Quel saint et religieux respect vous inspirez pour la vie des hommes lorsque la loi elle-même abdiquera le droit d'en disposer! Tant que le fer sacré n'est pas suspendu au fond du sanctuaire, le peuple qui l'apperçoit pourra céder à l'illégitime pensée de s'en attribuer l'usage; il offensera la loi en voulant la défendre; il sera peut-être coupable et cruel, par patriotisme et par vertu, dans les secousses d'une révolution, dans les premiers élans de la liberté. N'avons-nous pas vu Mais détournons de funestes souvenirs; et, sans deplorer des erreurs passées qui nous affligent, tarrissons-en la source, en adoucissant, en tempérant, en sanctifiant les mœurs publique par la grande et touchante leçon d'humanité que nos lois peuvent donner au peuple.

"L'effet que produit la peine de mort est immoral sous tous ses rapports: tantôt il alimente le sentiment de la cruauté; tantôt aussi par la pitié cette peine va directement contre son objet. C'est un grand malheur lorsque la vue du supplice fait céder le souvenir du crime à l'intérêt qu'inspire le condemné; or, cet effet est toujours auprès de la peine de mort: il ne faut que quelques circonstances extérieures, l'expression du repentir, un grand calme, un courage ferme dès les derniers instans, pour que l'indignation publique se taire, et tel sur l'échafaud a été plaint par le peuple, dont le peuple avant le jugement demandait la tête à grands cris."—(Rapport, &c.)

* Madame de Stael remarks that the populace of Paris would probably have not been so ferocious in the revolution, had they not been brutalized by the spectacle of human suffering at the Grève.

It may be said that, as punishment must necessarily consist in the infliction of pain, the evils which are here pointed out as connected with the punishment of death, are necessarily incidental to punishment of every description. This is undoubtedly true; but here we are considering the *degree* of the mischief. A punishment which is supposed either to inflict great immediate misery, or to be terrible in some of its consequences,—such, for example, as the deprivation of life,—accustoms the people to the idea of the infliction of great evils upon one another, and is more particularly liable to accustom them to the infliction of gratuitous evil. If the punishment were mild, this latter evil could not arise; and, in most cases, perhaps in all, it might be so managed as never at any one given instant to convey an idea of bodily suffering, but might effect its end by being rather a deprivation of pleasure, than an absolute infliction of pain. Confinement, for example, within a prison, does not present to the beholder the spectacle of bodily suffering; and thus the brutalizing effect of the punishment is materially diminished, perhaps wholly destroyed. In those cases, where the feelings of the people are with the criminal, the consequences are still worse. Where the people's opinion is against him, there appears sufficient justification for the infliction of misery; it would not have been inflicted but for a painful necessity; and thus the idea of necessity to justify its infliction is still in some measure retained. Not so, however, where the public sympathy is with the sufferer. Here the people are accustomed to the idea of gratuitous misery, and are either by this means (since the evil is produced by persons whom they are taught to respect) made to believe that ignominy and shame are not, and ought not be, necessarily coupled with the act of plunging a fellow-creature into unnecessary suffering; or their feelings of compassion being triumphant, they lose that respect for the law, that abhorrence for crime, which are the greatest safeguards of society.

As esteem for an individual often arises from a consideration of the deeds he has performed, so does admiration of his actions often arise from our esteem or affection for the individual. How often do we consider the conduct of those we love to be worthy of our admiration for no other reason than because it is the conduct of those we love! How often is our conception of what is true and virtuous corrupted by this sympathy! We are not here called upon to analyze this phenomenon: that it occurs cannot be doubted; that legislators have acted as if it were unknown is unfortunately equally certain: in no case more palpably than in the present have they shown themselves more utterly regardless of the consequences resulting from it.

Passing by the mischief produced by the people's still retaining

respect for their rulers when those rulers inflict what the people deem unnecessary evil, let us consider those which arise from their sympathy with the criminal becoming triumphant.

When compassion for the criminal is created, the evil consequences resulting from his crime are apt to be sunk and forgotten. Compassion, and the idea of the act, being often linked together in men's minds, the idea of its criminality is *permanently* excluded. In other words, we no longer consider the act a criminal one; and thus the salutary abhorrence which is connected with the recollection of the calamities produced by it is obliterated also. This is no fanciful hypothesis; nor are the evils connected with the circumstances by any means minute in their amount. The public mind is vitiated thereby, and that important check to crime, which results from the knowledge that ignominy and shame will follow it, is seriously weakened; and it destroys that still more important safeguard which results merely from a constant habit of considering the perpetration of certain acts with repugnance and disgust. It is, in truth, to education, the first of the preventives against crime, which we have mentioned above, to which we must look for the cure of this evil. In the ordinary intercourse of society a man's pocket is saved from attack, not by fear of punishment or shame, but by a feeling of repugnance to the very idea of the act, created by our education; which feeling, though it may originally have been produced by a contemplation of the mischiefs resulting from the act, is now utterly unconnected with any such considerations. It produces its effect instantly and certainly; it is the great safeguard of life, and ought not, when in any proper case it may have arisen, to be in the slightest degree weakened. That in many cases it has been weakened is manifest to every one; and a more striking example cannot be found than is afforded by the present general feeling respecting the crime of forgery, and the utter impotence of capital punishment in repressing that crime. So far as regards persons convicted of this offence, nothing could well be more steady than has been the conduct of the executive Government for the last sixty years. Whatever certainty could arise from a severe, unflinching administration of the law, has necessarily been obtained. What has been the consequence? Offence after offence has been passed over, criminal after criminal has escaped. The crime of forgery is little, if at all diminished; compassion in the highest possible degree exists among the people for those who are convicted; and, as may be gathered from all the vehicles of public opinion, *the proper feeling of repugnance to the crime is not the feeling of the community.* Thus all feelings of reverence for the law; feelings which ought to grow up with the citizen from his childhood; all desire to cooperate with it, and enforce its dictates, and to offer all obedience

to its commands, are utterly shaken and destroyed by thus setting it in opposition to the opinions of the people. Though obedience to the law ought to become a habit, yet it is a habit that must originate in a perception of the beneficial influence of such conduct, which perception can arise and can continue only when the law accords with the established feelings of justice and morality.

4. We have hitherto said nothing of what is yet to be regarded as one of the main ends of punishment, viz. the reformation of the offender. Death excludes this: and hence is drawn another reason against the infliction of death in any case, save those, if any such there be, in which it can be shown that the commission of them proves the culprit to be beyond the moral influence of punishment; unless, indeed, it should be urged that some cases exist where the expense and trouble of prosecuting this end are a greater evil than that of cutting off the offending member. We are strongly of opinion, that neither of these propositions can be supported. It is true that if we look to the effect produced upon criminals by punishments less than capital, as inflicted in this country, no doubt can exist as to their utter inefficacy as instruments of reformation. But this fact we are by no means inclined to consider as decisive. Had the object of the Legislature been to discover a speedy and completely efficient system by which a human being could be utterly degraded in his moral character, one might understand and acquiesce in the present system of prison discipline. Upon any other hypothesis, however, it seems impossible to discover how it obtained the approbation of persons removed even one degree from hopeless ignorance, or still more thorough indifference to the happiness and prosperity of their country.

The argument of those who support the propriety of capital punishment in the point of view now taken, may be stated thus: —Supposing the law to have declared that a certain mitigated punishment should follow the crime of murder, every person who should commit that crime must be supposed to commit it with the expectation of such punishment following his offence. If he prove guilty of that act, he shows thereby that the expectation of the punishment, in so far as he is concerned, has been utterly nugatory. Why, then, do you believe that such expectation will in future maintain a beneficial influence over him, he having given the best proof of the contrary by being guilty of the very crime you declared that you would punish? He is no longer to be trusted; and the only safe course is to put it out of his power to repeat the criminal act; and the only certain method of doing this is to deprive him of life.

This argument assumes (for otherwise it would not be valid,)

that a person once having committed a crime is incurably vicious: in other words, that he cannot be reformed; and also supposing he cannot be morally reformed, that means other than capital punishment are then inefficient to check him. Let us examine whether these assumptions be correct.

There are some crimes so terrible in their consequences, that men are apt to believe that the risk of their occurrence at the hands of the same criminal ought never to be hazarded. Murder and rape are perhaps the only crimes which appear thus dangerous to the people of this country.

We will pass by this class of cases, since, if they ought to be punished with death, the necessity arises from other causes than the depravity which they evidence. All other offences we will suppose not attended by any such terrible danger. That the crime of forgery is not followed by these terrible effects is too evident to need proof. It may be proper, however, to call the reader's attention to the fact. And respecting them we will ask the question, whether they be evidence of incurable depravity? It will be well here to learn precisely what is meant by depravity in these cases.

So few (if any) of the offenders against the law can be supposed to contravene its dictates merely for the pleasure of doing so, that if any exist, they may fairly be put out of the question. Some ulterior object is usually in view, and with some very few exceptions, the object is gain; gain to be applied usually as means of subsistence; sometimes as means for the attainment of mere pleasures. Now depravity may be said to consist in the loss of all feelings of pain arising from remains of virtuous shame when an illicit means is resorted to of obtaining this gain, and it may be said that this depravity is incurable when no measures are sufficient to rekindle in the bosom of the offender a distaste for these acts when in opposition to the slightest amount of this advantage.

In a state of society where this distaste is the only great safeguard, the irretrievable loss of it would be a valid reason for getting rid of the criminal, provided so doing were a less evil than permitting him to live. But in a society where other motives to good conduct can be brought into action, this utter depravity bears not this character. If a man be without shame at the idea of thieving, still he may fear a punishment; he may be made to fear the punishment more than he fears labour. He may be made to feel, that thieving added to punishment is a less desirable thing than hard work without it. He may, in other words, be deterred, though not morally *reformed*.

But let us push this inquiry still further, and endeavour to learn what it is that inclines us to constitute *degrees* of depravity;

to consider one man more depraved than another; to believe that some men are so depraved as to be incurable. The reason for this belief, if we mistake not, is, that the same degree of temptation has different effects upon different men; and some acts are believed to be evidence that the smallest temptation will at any time be sufficient to induce the individual committing them to brave the ignominy which society will visit on him in consequence. If a man commit a small crime upon very great temptation, he is said to be little depraved; diminish the temptation, and increase the crime, he is said to be more depraved: at length there comes a point at which the temptation is so small, and the crime so great, that he is said to be incurably depraved.

Upon this, it may be shown, that great crimes are not proofs of this incurable state; it may also be made evident that the persons who usually commit the greater portion of the great crimes, viz. the poor, are put in that situation in which the commission is no evidence of incurable depravity; and that thus, in their cases, there is no reason to assume it, as an excuse for hanging them:—that, in other words, they might be reformed, or rendered averse from committing crime in future.

Two cases will illustrate what is really meant by temptation. A man sees his wife, and half a dozen children starving; he himself is also nearly famished. Where to obtain food honestly he knows not. Under these circumstances, he steals a sheep worth two pounds. Another man, possessing a thousand a year, sees that by spreading a false report, he may, by affecting the stocks, gain five hundred pounds. He spreads the report. Here are two acts considered crimes by our law—one sheep-stealing, the other swindling.—Which, we ask, is the sign of greater depravity? The temptation of the five hundred pounds, in the one case, was, as compared with the temptation of relieving the want in the other, but as a feather; and, though the crime of sheep-stealing be considered the more atrocious offence; one to which our law affixed the punishment of death; that crime may not be, we believe usually is not, the offspring of depravity equal to that of the stock-jobbing swindler. The degree of depravity then has little to do with the degree of the offence. One other important conclusion is to be drawn from this illustration, viz.: that, since the heinousness of the crime, that is, its evil influence upon others, is not the test of the state of mind in the offender, the heinousness of the crime is not the circumstance which ought to determine our expectations as to the possibility of restraining and reforming the offender.

The poor in this country, and in all other countries and in all other times, as well as the present, have been, and are exposed to greater temptations to crimes against property than the richer members of

the community, and, although as a body, regard being had to their numbers, they may possibly be considered as the most virtuous class of the community, still the greater portion of crime is committed by them. Pressed as they are by continued want; required as they are every day of their lives to labour, and labour hard for the scanty pittance on which they are compelled to subsist, it is not wonderful, that they should sometimes yield to temptation, and become offenders in the eye of the law. The career of crime is usually begun by some petty delinquency—a means of gain is held out—a disgust for labour may at that unlucky moment prevail (and where is the man who does not at some minute loathe his daily employment,)—in an unguarded moment, the unlawful act is committed. He escapes detection, and again some pressing emergency comes, again comes the temptation, and again follows the yielding to its influence. At length comes detection;—and now (waiving reference to society, in the way of example,) arises the question respecting the best means of dealing with the offender. If the offence have been committed under the influence of some dreadful misery, there is no reason to believe him a hardened criminal:—by again, after punishment, letting him loose upon society, you run no very perilous risk. If he go forth again to be subjected to the temptations which want necessarily creates, he goes forth better armed than before. To the former feelings of virtue, which up to the fatal moment had kept him honest in his conduct, is now added the dread of punishment—a punishment now more present to his mind than before,—more definite,—more dreadful. He goes forth subjected to the same temptations which hundreds daily resist; and which he himself, except in one fatal instance, had also resisted. If his poverty be a reason for depriving him of life, thousands, nay, millions, are equally guilty. If it be said, that he has shown himself unable to resist the temptations which want will bring, may it not be answered, that failing once is no absolute proof that he will fail again; still less is it a proof when we know that the hope of impunity, and the carelessness connected with punishment unfelt, is now materially diminished, if not completely destroyed? If the act, however, be the last of a long series of crimes, it is possible by care to lead back the mind of the criminal to its original virtuous state: or, if he have been brought up in vice, to create a virtuous feeling. A new circumstance is now brought to bear upon him:—suffering in consequence of his evil deeds has before been unknown; and due attention to the training of his moral character has not been afforded. Though he be now insensible to shame, there is no reason to believe that he never can he made sensible to it; though hitherto he have not dreaded punishment, there is no reason to believe

that he may not be made to dread it; though hitherto he may not have seen, or appreciated the advantage of earning his subsistence honestly, there is no reason to believe that he may not be made to see it.

Of almost all the crimes committed for the purpose of gain, it may be said, that they have either originated in the presence of want, or in the expectation of escaping detection. If they have arisen from want, the temptation was great; and here, no incurable depravity is manifested. If they have come from an expectation of escape, all the virtuous feelings connected with shame may still be, and usually are, alive,—as witness the cases of forgery. Here, again, there is no evidence of incurable depravity. The conclusion then is, that, as far as evidence is hereby afforded of the impossibility of prevention, through terror or reform, in these cases, no justification on this plea exists for the execution of the offenders.

To the mischiefs, in the way of uncertainty, resulting from the irrevocable nature of the evils inflicted by death, we have already adverted. It remains but to mention, for to enlarge on the matter were useless, the dreadful horrors produced by thus punishing an innocent man. That the punishment has seldom fallen on the innocent, we sincerely hope and believe. Still cases may be adduced, and some of recent occurrence, in which it is almost but too certain that the guiltless have suffered. It must be a stern and terrible necessity which can justify a legislator in establishing a punishment thus pregnant with danger and alarm.

This justification is not to be found in the expense which would be incurred by otherwise getting rid of offenders. Supposing even that reformation were impossible, transportation, if no other means could be discovered, might be adopted, as an easy, cheap and expeditious method of disposing of incorrigible criminals. The amount of the expense would be found absolutely insignificant.

Transportation, however, is not the mode which we should propose, as that which could be most advantageously employed as a substitute for the mischievous system we have been discussing. Our purpose now, however, is not to point out the secondary punishment which ought to be adopted. The subject is too important to be summarily treated at the end of an article. It cannot be briefly or hastily dispatched, but requires a long and patient exposition; and, though this exposition be absolutely requisite to complete the matter of which we have here been treating, we must, however unwillingly, postpone it to a further opportunity; our present object being attained, if we have clearly and sufficiently exposed the objections to employing the punishment of DEATH.

Art. IV.—THE LAWS AND JUDICIAL ESTABLISHMENTS OF THE COLONIES.

During the last twelve years, extensive and accurate information has been obtained on the subject of the Colonial Courts of Law, and the Constitutions of the Colonies. New South Wales and Van Diemen's Land were visited by a commissioner in 1821; the Cape of Good Hope in 1824; Sierra Leone in 1825; Mauritius in 1828; Ceylon in 1829; and the West Indies in 1824, and in subsequent years.* Commissioners at home have since surveyed some of the legal establishments in the Eastern Colonies, as well as those of the Mediterranean; and there has been placed before the Finance Committees accounts of the population and judicial expenditure of all the Colonies; whilst Special Committees of Parliament have collected evidence upon Canada, and upon the legal condition of the slaves and free people of colour in the West Indies, the Cape of Good Hope, and Sierra Leone.† Several important acts of Parliament, and orders in Council, have been passed in consequence of these inquiries. But much still remains to be done; some of the proposed plans are obviously drawn without a due appreciation of the state of things in certain remote Colonies, and particular points of the greatest importance have obtained too little attention. Mere policy often prevails in the place of legal principle; and personal influence, varying with local prejudice, and subservient to sinister interests, finds too little check in any fixed system of legal rule; while the progress from the wild discretion of individual will to unbiassed judgment, founded upon well-known laws, has hitherto been very slow in our Colonies.

It deserves consideration, that, in the last century, there was obtained from Mr. Yorke the Attorney-General, and Mr. De Grey the Solicitor-General, a report of great value upon the subject of colonial courts of law. It was dated in 1766, and seems to have been recently lost sight of, although Sir William Grant was aware of its existence, having quoted it in a judgment at the Rolls. This report is recorded in the Privy Council Office, and would furnish useful hints on the similar inquiries now in progress. The eminent persons who drew it up recommend a simplicity of pro-

* Of the Reports of the West India Commissioners we have already given a brief account, (vol. i. p. 421.), but the importance of the subject, the additional information, and the more copious method of treating it, which the present article displays, will be a sufficient justification for our returning to it.

† The legal condition of the free coloured people elsewhere, as in Australia, in Canada, and on the borders of the Cape, has been neglected, with many points respecting the interests of those in the Colonies mentioned above.

cedure still wanting in the Colonies, although later experience of the evils of the old system has long added new arguments in favour of change. It related to Lower Canada, and, together with the suggestions made at the same time by Baron Maseres, would throw much light upon colonial legal affairs. Lord Loughborough also, and Mr. Perceval, were convinced of the necessity of a reformation in these affairs.*

Reserving the subject of the legal condition of the people of colour and that of appeals to the Privy Council for another occasion, we proceed to offer a few remarks upon some of the materials which the various documents we have referred to furnish.

The laws prevalent in the British Colonies are divisible into six classes:

1. The laws which have been carried thither by British settlers.
2. Those made by the local legislatures.
3. Those made for them expressly by Parliament.
4. Those adopted by usage.
5. Those continued from the times before conquest in certain Colonies.
6. Those which conquered Colonists acquire forthwith upon submission to Great Britain.

The judicial establishments of the Colonies are equally various with their laws; while some have been introduced from England, or devised in the Colonies themselves, others are of French, of Dutch, and of Spanish foundation.

Laws of the first class prevail in all the Colonies originally settled by the English, as Upper Canada, Nova Scotia, New Brunswick, Bermuda, Barbadoes, Jamaica, and some other of the West India islands; and in a very limited degree those laws apply to Englishmen in *conquered* Colonies.†

Those of the second, third, and fourth classes prevail in all the colonies, whether originally of British foundation or acquired by conquest; and those of the fifth and sixth classes of course apply specially to the original settlers in conquered colonies, as to Lower Canada, Trinidad, Demerara, St. Lucia, Malta, the Cape of Good Hope, Mauritius, and Ceylon.

There are also some irregular settlements in which the ordinary institutions of British colonial government are not at once esta-

* First Report of the Commissioners of West India Inquiry, House of Commons' Papers, 1825, No. 517, p. 86.

† Lord Stowell decided, that the Dutch law of marriage, which was stipulated for at the conquest of the Cape of Good Hope, did not prevent a marriage being legal which was solemnized by the English Chaplain of the Forces, and not according to the Dutch law. 2 Haggard, 394, *Ruding* v. *Smith*.

blished, as New South Wales, and Van Diemen's Land, convict settlements; Gibraltar, a fortress; Newfoundland, heretofore a fishing post; India, made up of conquests and trading posts; and the United States of the Ionian Islands, which are under the superintending protection of Great Britain. In these dependencies there is much difficulty in reconciling the departure which they exhibit from ordinary colonial institutions, with the wishes of many of their inhabitants; and in convincing men that any such departure is required. Angry discussions arise from the discontents of those who naturally foster English feelings even under despotisms; and, although justice ought to be the rule of all governments, whatever be their forms, British forms are more and more strongly recommended to British subjects by the disregard to justice which is sure to be experienced wherever they do not exist. The only justification of such perplexing peculiarities is, the danger of worse effects under a constitutional establishment. Where, therefore, as in the cases of Honduras, the Swan River colony, and Sierra Leone, no special circumstances exist, and no evil can be reasonably expected from a duly established constitution, the contrivance of such illiberal schemes of government as now exist in those places deserves the severest reproof, and unquestionably tends to impede the general prosperity of the people.

Throughout the irregularities which obscure this subject there are certain rules which are of general application. However charters of foundation, or acts of parliament, or treaties, or articles of capitulation, may for a time settle particular laws for the government of colonies, two great rules must gradually prevail: first, the colonists, when of English origin, take with them from home such free laws of the mother country as may be suitable, leaving behind such as are unsuitable, to their new circumstances; and, secondly, the colonists of foreign origin both preserve so much only of their former laws as may not be inconsistent with the British supremacy and constitution, and also, by the union, acquire, to a certain extent, a British constitutional character; for example, in the first case, trial by jury and controul over public money cannot be refused, while the game laws and tithe laws are never carried to a purely British colony; in the second, torture cannot be continued in a British conquest, and the rights of petitioning accrue forthwith to the new British subjects.

We proceed from these few general remarks to the examination of the laws and judicial establishments of particular colonies in succession, and of certain incidents and institutions common to them all, accompanying our narrative with such statistical information as may illustrate the subject.

In Barbadoes the population consists of 16,997 whites, 4,214 free people of colour, and 80,551 slaves: the revenue is £32,822;

the area of the island only 163 square miles. Here the common law, which is in force, embraces almost all obligations between man and man; all civil rights, descents and distribution of real and personal estate, and the rules of evidence. The English statutes passed before 1627, *applicable to the condition* of the island, were carried thither at the settlement* in that year. The qualification excludes the bankrupt laws, poor laws, the police, tithes and mortmain acts, together with penal laws inflicting forfeitures and disabilities. Of acts passed in England subsequently to the settlement, such only affect the colony as expressly or virtually include it by the terms "Barbadoes,"—"the West Indies," or "the Colonies," or "Plantations." But all navigation acts, and acts of customs and trade, and on shipping, are binding in Barbadoes, though not named.† The laws made in the island are passed by the governor and council appointed by the crown, and assembly elected by the freeholders, now including free men of colour. They must be reasonable, and not "*repugnant*"‡ to the laws of England—a term to which no sensible meaning can be attributed, if the unlimited departures from English law recognizable in the laws of Barbadoes, and in the laws of all the other colonies subject to the same qualification, be considered. It is, in fact, a term that has never obtained any other weight than the wavering policy of the home authorities may from time to time have found it convenient to allow; and it would be wise to impose directly upon all subordinate legislatures the conditions to which they are really subject, rather than to use words which only occasion difficulty whenever seriously referred to. The same remark applies to another rule of colonial legislation (not confined to Barbadoes), namely, that it be subject to the allowance of the King in Council. The form of obtaining this allowance will be an exposure of its worse than inutility. The result in Barbadoes, as urged on the spot, (and it applies to all Colonies,) is, "that great inconvenience is felt for want of a certain rule to know what *acts* remain in force, or *when* acts cease to be binding; when acts are allowed at home, and when disapproved. The Order in Council of 1800 (the last on the subject) is so ambiguous, that lawyers have differed from each other, and from themselves, upon its construction."§ The Commissioners consider these complaints exaggerated, but they trace as follows the operations in

* With respect to the English acts of parliament binding the colonies without expressly mentioning them, the dates will be found in our former article on this subject, vol. i. p. 424.

† First Report of the Commission of West India Inquiry, p. 5, House of Commons' Papers for 1826, No. 517.

‡ 7 & 8 W. 3, c. 22, s. 9.

§ Minutes of March 11, 1823, quoted by the Commissioners of West India Inquiry, *ubi supra*, p. 8.

England which produce this alleged, and we must say probable result. On the arrival at the Colonial Department in Downing Street of West India Acts, they are referred by the Secretary of State to the counsel of that department for his opinion upon them in point of law; that is to say, whether the laws are repugnant to any law in England, and whether they are so framed as to give full effect to the purposes of the colonial legislature. His Report is sent, accompanied by the Acts, to the Lord President of the Council, with a letter from the Secretary of State, desiring his Lordship to lay them before the King in Council. At the first board of the Council the acts are referred to the Lords of the Committee of Council for Trade and Plantations, to report to the King in Council their opinions, as to what proceedings it may be proper to take in relation to them. It is understood that this Committee select all such as present any novel or important points, for reference to the Attorney and Solicitor-General for their opinion, which are considered along with all the acts by the Committee, assisted by the Secretary of State for the Colonies. A report from this Committee is then made to the King in Council, classing the acts under three heads; 1st, the disallowed acts, with the grounds of objection; 2dly, particular cases for express confirmation; and 3dly, the great majority of the acts advised to be "left to their operation." If this report be adopted by the King in Council, orders are made for the two first classes, and the Clerk of the Council conveys the determination of the King in Council to the Secretary of State for the Colonies, who communicates the result to the governors.

Thus, in the great majority of acts, no express allowance is signified; and the King may, it seems, at any time, notwithstanding the acts are long "in operation," still exercise his *prerogative* of disallowing them. The uncertainty into which colonial legislation is thrown by this system is defended by the Commissioners of Inquiry for "reasons *not difficult to be discovered*"—a conclusion in which few will join them.

With this confusion at the fountain, it is not a matter of surprize to find that many of the statutes of Barbadoes are in unknown manuscripts. "The state of the modern statute law of the Colony," said the Chief Justice, "is very distressing; there are 67 laws in manuscript, and we know nothing about them;" he added, that "an act for printing these laws had been passed, but it was not confirmed at home. Upon further inquiry, and after a painful perusal of all the statutes, the Commissioners were satisfied that the manuscript laws amounted, not to 67, but to 247."* Access to these manuscript laws is difficult, and the

* West India Commissioners' Report, p. 6.

mode of producing them in the courts is represented in contradictory ways by the Attorney-General, the Solicitor-General and Chief Justice of the island. "Such," say the Commissioners of Inquiry, "is the obscurity, uncertainty, contradiction, confusion and error occasioned by neglecting the ordinary and most obvious means of notifying the commands of the legislature."* Nevertheless the Commissioners attempt to justify the refusal of the government at home to permit the printing of these statutes, amongst other reasons, because "a precedent† would have been established of dangerous application in the case of other colonies."

The civil courts are, the Courts of Chancery, composed of the governor with four or more members of council; of Error, or Appeal and Error; of Ordinary; of Common Pleas, held in each of five districts; of Admiralty, and of Escheat. There is also a court of merchants and mariners appointed for special causes; and single justices have summary jurisdiction on claims for service, work and labour by servants and labourers, extended to those who exercise any manual labour, as shoemakers and tailors, as well as to all demands arising from the sale of the produce of the island.

The criminal courts are those of Grand Sessions, held twice a year; the Quarter Sessions (a disused court); a court for trying slaves for capital offences, consisting of two justices of the peace and three freeholders, with an appeal to the governor and council; and the Admiralty Sessions, held as occasion may require.

The judges of the Chancery have all the authority of the Lord Chancellor in England, except in cases wholly inapplicable to the colony. The rules are in *manuscript*, and often not known to the practitioners. In this court an instance is found of the force of usage only, in establishing a jurisdiction for which no other origin than usage can be adduced. On behalf of a wife for separate maintenance, on account of misconduct in the husband, the remedy is granted, although there was no agreement for a separate maintenance.

There is no bankrupt law in Barbadoes, but the principle of *cessio bonorum*, and the discharge of debtors upon insolvency, are acknowledged and acted upon in the Court of Exchequer, which in other respects is confined to crown suits, and proceeds according to English precedents.

The Common Pleas' Court is regulated by manuscript orders little known to the practitioners. In the causes tried in this court, evidence may be taken before a justice of peace, the attornies of both parties being present to examine and cross examine the witnesses; and the depositions so taken are authenti-

* West India Commissioners' Report, p. 7. † Ibid, p. 6.

cated by the justices. The usage upon arrest for debt is remarkable. There is no affidavit of the debt; and arrests are allowed upon claims prosecuted for unliquidated damage, as in actions of trespass, defamation, or the like; in which the defendant may be arrested for the amount of the damages laid in the declaration. With an exemplary care for themselves, the legislators of Barbadoes have decreed, that freeholders capable of electing, or being elected members of the House of Assembly, are exempted from arrest.* The proof of debts where the creditor resides, and the debt accrues in England, may be made before the Lord Mayor of London;† and upon that proof the colonial courts award judgment against the debtor in the island. Of this convenient law, which has been adopted of late years in regard to other colonies, the Barbadians are reported to complain loudly; but the Commissioners have not had great difficulty in finding reasons to approve it. The colonists, however, say justly, that they ought to have the like facility in proving, by testimony taken before an authority in the island, obligations into which residents in England have entered when there; and who, by the present law, can be sued only by the ruinous expense and precariousness of sending witnesses home or by having commissioners sent to examine them.

Throughout all the judicial establishments of the West India Islands, including Barbadoes, the fee-system prevails; and where the dockets have not been lost, or mislaid, or purposely put aside,‡ (for printing such documents is marvellously neglected,) the amount and variety of the payments are such as to indicate no small skill in the contrivance of the schedules. In criminal cases even an acquitted prisoner is liable to detention until he pay to the clerk of the crown a fee of 3*l.* 17*s.* 6*d.* besides the gaoler's fees. "The criminal court," say the Commissioners of Inquiry, "professes in its practice to follow the laws and rules of the criminal courts in England;" yet it appears, that the judge takes no notes, and delivers no opinion; but the attorney-general "charges the jury, expounds the law, prosecutes, and sums up." Besides this somewhat violent departure from English law, "the attorney-general will not prepare an indictment in a case which has not been before a magistrate, the magistrate receiving a fee.

* Commissioners of West India Inquiry, First Report, p. 35.

† 5 Geo. II. c. 7. The operation of this statute in other islands is noticed by the Commissioners; and the testimony which they have collected upon it is conflicting.

‡ In the Court of Admiralty, a docket of fees, sent out by Sir William Scott, about the year 1814, after hanging a few days in the office, and having its face turned to the wall, suddenly disappeared. By singular good fortune, it was accidentally recovered, one or two days before the Commissioners entered upon the inquiry into the proceedings of that Court.—*First Report of the Commissioners on Justice in the West Indies. House of Commons' Papers for* 1825, No. 517. p. 55.

The grand jury will not receive a bill that is not presented by the Attorney-General, the Attorney-General conducting all prosecutions."* And, from the papers laid before the Finance Committee, we learn, that the attorney-general will not prosecute, except for persons actually paupers, without being paid "5 guineas, 10*l.*, or sometimes more; and he receives 200*l.* per annum from the island for prosecuting for paupers," (p. 28.); the clerk of the crown also receiving fees at every step in criminal cases, amounting from 15*d.* to 5*l.* per step.—(p. 26.) The commissioners further state, that "it was matter of very grave complaint, that the Attorney-General was in the habit of receiving fees of various amount, for entering *noli prosequis* on criminal prosecutions."—(p. 47.)

There are fifty jndges in the different courts of the island, none of whom have been prepared for their posts by previous professional habits or education. The consequences are, great uncertainty, great delay, and enormous expense† in the administration of the law.

A single justice of the peace tries complaints against slaves for offences not capital; and, besides felonies, the misdemeanors are numerous, in fifteen months 2500 cases being brought before one magistrate; but great crimes seem less frequent than in England, as the executions are one-third fewer, and the commitments for felonies one-half fewer, than in this country.

The gaol is managed in almost the worst possible manner. Debtors are not always separated from criminals, or men from women. Classification according to age, or offence, is out of the question; and there is no employment for the prisoners in the gaol, or for slaves in the "cage."‡ There is no chaplain appointed, no books are furnished, nor is even a surgeon provided by the public.§

The great remedy proposed by the Commissioners for the foregoing evils is a consolidation of the local civil courts of the island into one, to be established at Bridge Town only, (without circuits), under regularly educated judges, holding their offices during good behaviour.

The annual expense of the present establishments, independently of what is paid by the parties to their attornies and counsel, is as follows:—

* First Report of the Commissioners of West India Inquiry, p. 47.

† An example, selected by the Commissioners, of the expense of law in all the West Indies, is the "usual retaining fee of 100*l.* previous to commencing a suit of importance."—p. 56. and Third Report, p. 116.

‡ First Report of the Commissioners of West India Inquiry, p. 61.

§ Papers printed for the use of the Finance Committee, p. 61. These Papers contradict the Commissioners on the practice of separating men from women.

The Island Secretary, who is Secretary to the Governor and Council, Remembrancer of the Exchequer, Registrar of wills and deeds, . .	£	33	6	8	Salary.			
		1298	0	0	Fees.			
		206	0	0	Rent and Clerks.			
						£	1537	6 8
Provost Marshal, . . . No Salary.					Fees,		1280	0 0
Chief Baron of the Exchequer, who is Master in Chancery, ...					Fees,		3	6 8
					Fees,		822	0 0
Prothonotary of the Common Pleas, . .					Fees,		466	0 0
Chief Clerk, Registrar, and sole Examiner in Chancery, and Clerk of the Peace, . .					Fees,		226	0 0
Procurator-General in Admiralty, . . .					Fees,		183	0 0
Chief Judge of St. Peter's, ...					Fees,		70	0 0
——— St. Andrew's, ...					Fees,		33	0 0
Attorney-General, . . Salary, £200, Income from Fees—not known.							200	0 0

The legal amount of office fees is as follows :—

The Colonial Secretary's, from 1*s.* to 25*l.* on various acts; the Remembrancer's, from 7*s.* 6*d.* to 2*l.* 10*s.* for various acts; the Notary's, from 6*s.* 3*d.* to 5*l.*; the Clerk of the Common Pleas, from 1*s.* to 12*s.* 6*d.*; the Marshal of the Common Pleas, from 1*s.* to 5*l.*; the Provost Marshal, from 1*s.* 3*d.* to 5*l.*; the Marshal of the Exchequer, from 1*s.* 3*d.* to 5*l.*; the Master in Chancery, from 2*s.* 10*d.* to 10*l.*; the Proctor in Admiralty, from 5*s.* to 7*l.* 10*s.*; the Chief Justice of the Common Pleas, from 5*s.* to 2*l.* 10*s.*; the fees of Justices of the Peace, from 1*s.* 6¾*d.* to 2*l.* 10*s.*; a Constable's, from 1*s.* 6¾*d.* to 12*s.* 6*d.*; the Coroner's, 3*l.* 15*s.* to 5*l.*; the Registrar in Chancery, from 6*d.* to 2*l.* 10*s.*; the Clerk of the Crown, from 1*s.* 3*d.* to 5*l.*; the Judge of the Admiralty, from 1*s.* 6*d.* to 10*l.*; the Marshal of the Admiralty, from 7*s.* 6*d.* to 15*l.*; Attornies in the Common Pleas, from 1*s.* to 5*l.*; Counsels' fees, from 1*s.* to 5*l.*

Jamaica will be presently seen to be in some respects exempt from certain of these evils; but they prevail in the other colonies so much as to have suggested the necessity of an extensive change. Heterogeneous and numerous courts—judges without learning, and either dependant or partial—and proceedings dilatory and ruinously expensive, condemn the existing system to speedy extinction throughout the West Indies.

The new plan of judicial administration proposed by the Commissioners for Barbadoes, embraces Grenada, Tobago, and St. Vincent in one circuit. It also includes Dominica, Antigua, Montserrat, Nevis, St. Kitts, and the Virgin Islands in another circuit. Another circuit has been actually formed for Demerara and other more southern colonies.

The plan proposes to have a resident judge and a solicitor-general in each island, to transact all ordinary business preliminary to the hearing of a suit, or the trial of a cause, at the circuit; the resident judge will also preside in a court for the recovery of small debts, in an escheat court, and in taking the acknowledgment of deeds, private examinations of married women and the like; he is to act also as chairman at sessions of justices for trying cases of petty larcenies and trifling misdemeanors.

On each of the first two circuits it is recommended, that there should be two superior judges, one for equity, and the other for common law, and one attorney-general, all appointed from England. The equity judge is proposed to act as ordinary, and in the Admiralty Court; the common law judge to preside in all the courts of common law, and in the superior criminal court. Both are to go the circuit at stated periods; the common law judge is to sit at nisi prius for the trial of causes, and afterwards in banc, assisted by a local judge, with a power of calling in the equity judge, in case of difference of opinion; the equity judge is to go the circuit at the same time, and also at other periods, at his discretion.

There are points, however, in several of the islands proper to be especially noticed even in this rapid sketch, and which ought not to be lost sight of, whatever reform is adopted. In Tobago unusual facilities are afforded for the recovery of just claims upon the *property* of deceased debtors, which are believed to have improved credit and to have restrained fraud; and for the recovery of demands under £10, the court of summary jurisdiction has been found so convenient, that it is desired to increase the amount recoverable to £20. In the Bahamas an act was passed in 1799 to declare how much of the law of England ought to be in force there. In Grenada, and in other islands, counsel are allowed to address the jury on behalf of prisoners. In Antigua, Nevis, and elsewhere, slaves can be witnesses, although not on oath, and somewhat precariously. In all the islands except Jamaica and Barbadoes, the convenient practice is followed of advocates doing the business of attornies. But it is said by the Commissioners (Third Rep. p. 5.) to be desirable, *if it can be effected*, that the different branches of the profession should be kept every where distinct. As the condition marked in italics is one impossible to be complied with in small communities, without an amount of expense and an evil in the disclosure of affairs to which no community will long submit, the suggestion need not occasion great uneasiness in reference to ultimate measures. But the great inconvenience which has been suffered at the Cape of Good Hope and in New South Wales by adopting this false idea of purifying

the practising lawyers, renders it proper to notice the recommendation, upon which something further will be said when we are treating of the legal institutions of the Cape of Good Hope. In St. Vincent's the pleadings subsequent to the declaration (and matters are often managed without even a declaration) are *ore tenus;* so that as the Chief Justice stated to the Commissioners of Legal Inquiry, they "get on with wonderful rapidity." If the cause of action does not exceed £50, the plaintiff is obliged to give the defendant a copy of the account, bill, bond, or note of hand, without a declaration, but with the writ of summons annexed; and this secures at the trial the benefit of the common counts, in debt or assumpsit, as the case may be, the same as if the suit had been conducted more formally.* In St. Vincent's also the judge from whose decision an appeal is made, gives his reasons for that decision in the court to which the case is carried in appeal; but he does not vote upon the judgment in appeal. In Dominica six men may constitute a jury. There also, as in most of the other islands, estates tail, reversions and remainders are barred and conveyed by an acknowledgment before a judge; and dower is barred by an examination of the wife before a judge. Many other points worthy of notice might be enumerated; and if in the New Courts, (provided with a few legal judges in the place of the large bodies of planters,) the expense of litigation in fees is abridged, materials already exist for greatly facilitating the improvement of the law in the West Indies.

The Commissioners of Legal Inquiry press with sufficient earnestness, that the Rules of the Courts, and the Colonial laws generally, should be printed. But they have entirely omitted the all-important point of *regularly reporting* judicial proceedings. It is not rash to say, that no other method exists by which, at little cost, courts of justice can be so beneficially checked, and the uniformity of law promoted, as by having reports of cases taken and published at the public expense, without interfering with the independent newspapers and reporters.

In Tortola the Commissioners received information with regard to the *Peace-Brokers*, or Court of Reconcilement, in the Danish colonies, the constitution of which they have described in the following terms:—

"This is a court of the first instance, preliminary in all proceedings in the supreme court, and has jurisdiction in all civil cases except actions on bills of exchange, &c., where the time of payment has been already under the consideration of the parties, and these it is thought should be punctually paid, without terms of any kind given in this court. The plaintiff having preferred a complaint in this court, is a condition precedent to his recovering in the trial court. Two judges for this court are

* Second West India Report, House of Commons' Papers for 1826, No. 276, p. 13.

chosen by the community, out of six persons named by the governor. If the parties are not reconciled, there is no expense; if they are, there is a trifling fee payable for the servants of the court. The judges have no salaries.

"The proceedings are these: the plaintiff prefers a complaint; the defendant has notice; both are required to attend. Personal appearance is never dispensed with except in cases of dangerous sickness, &c.; and when, in very urgent cases, appearance by attorney is allowed, the attorney must have a general power, without any reservation, to reconcile the difference. If the defendant makes default, he will have to pay all the costs of this court and the trial, and that although he should eventually succeed in the action, and also a small fine to the public, for the contempt.

"When they appear, the parties are heard at length, and state what they please of their affairs, and *without prejudice*, for the sitting is private and the judges sworn to secresy; and it is understood the parties are not to be bound by what is offered or admitted there, if they are not reconciled.

"The judges usually press the plaintiff to give the same time for payment as it would take him to enforce it by suit or action.

"When the parties are agreed, the judge gives a certificate of the reconcilement, which has all the effect of a final judgment, without appeal; and at the expiration of the time, according to the terms of the judgment, the sheriff levies upon it as on an ordinary execution.

"If the parties cannot settle terms, the judge makes a note that an attempt to reconcile was made, and proved fruitless, and it was therefore referred to the court for trial.

"Crimes cannot be brought under the notice of this court, or misdemeanors, where the offence is palpably of a public nature; but where the injury is chiefly to an individual it may, as *ex. gr.* a battery may be reconciled—an attempt to murder cannot; penalties may, and where a share goes to the king, that share is often remitted to encourage reconcilements: but it is never allowed in charges brought against public officers; if their conduct is impeached there can be no composition.

"There are special cases, in which one of the judges is at liberty to try to reconcile, without waiting to form a court, as between mariners and transient persons, &c.

"No lawyer, or lawyer's clerk, is on any account to be allowed to show his face while reconcilements are attempting."*

In Jamaica, there is a population of 6,400 whites, 30,000 free people of colour, and 330,000 slaves; a revenue of 490,000*l.*; and an area of 6,400 miles square. The laws resemble those of Barbadoes, but the legal establishments are superior in the material point of the Chief Justice being a lawyer (generally independent of local influence), and in the existence of inferior courts for free persons. The law of Jamaica is based upon the

* Third Report of West India Legal Inquiry, House of Commons' Papers for 1826, p. 104.

common law, and upon the Statutes of England passed before the year 1724, so far as both are applicable to the condition of the island. The local statutes have been subject to the rule, that they should not be repugnant to English law: but the manner in which the principle has been applied may be inferred from the fact, that during the whole of the last century, local statutes were passed to incapacitate *free* people of colour from holding numerous offices:* from taking "exorbitant" grants and devises from white people;† from voting at elections;‡ or from exercising various mechanical professions;—restraints obviously repugnant to the British Constitution, and now happily abolished. In common with other colonies, all the property of a deceased debtor, whether real or personal, is liable to the creditor.

The Supreme Court of Judicature is composed of a Chief Justice appointed by the Governor, and confirmed by the King. The Judges are appointed by the Governor. They all hold their offices during the King's pleasure, but may be suspended by the Governor with the consent of a majority of the Council. The Chief Justice receives 5,720*l.* currency per annum, which is in lieu of all fees or other emoluments; he has been a barrister since 1803; but not necessarily so by any law. The assistant Judges are not lawyers by education; the two seniors receive salaries of 700*l.* currency per annum each. The Supreme Court is, with a few deviations in practice, coextensive in jurisdiction with the Court of King's Bench in England, and it has concurrent jurisdiction with the Admiralty Sessions. It has jurisdiction in all civil actions of which the Court of Common Pleas in England has cognisance; but no real action, except partition and dower, is sustainable there. It has also a revenue jurisdiction by local statutes. The rules of the Court are in *manuscript*. The Courts of Circuit are separate from the Supreme, both for civil and criminal cases. The Judges of Circuit have salaries of 500*l.* each. Juries are summoned in these Courts as in England.

The Chancery Court is held by the Governor as Chancellor, and the practice resembles that of England. The Governor is also ordinary.

A Vice-Admiralty Court is likewise held in the island by a Judge, who, during peace, when his emoluments are about 100*l.* a year, practises as a barrister.

Appeals lie from the Supreme and Circuit Courts to a Court of Error, held by the Governor and his Council; in cases where the matter in dispute exceeds 300*l.* sterling in value, except in the case

* Jamaica Acts of 10 Anne, c. 4. s. 35. † 2 G. 3. c. 8. ‡ 2 G. 3. c. 15.

of a judgment or ejectment, or where any tax, or other right of the crown is involved, when the value need not be stated. From this Court of Error an appeal may be carried to the King in Council; as it may directly from the Courts of Chancery in ordinary. From the Vice-Admiralty Court the appeal lies to the Court of Admiralty in England.

The parochial administration of justice is by Justices of the Peace, with powers like those of English Justices, or custodes, who in each parish exercise the office held by a *custos rotulorum* of a county in England. The criminal jurisdiction of the Justices is limited to matters of police, and to the commitment of free people for trial at the superior courts, or at the Quarter Sessions. The Quarter Sessions that determine by Juries have a concurrent jurisdiction with the superior courts in cases not extending to life; and they can punish by fine, imprisonment, and whipping. Two Justices of Peace can decide in a summary way, and without appeal, disputes between masters and servants to an amount not exceeding 100*l.*; and between other parties not exceeding 40*s.* Besides these minor jurisdictions, there are parochial Courts of Common Pleas, consisting of four Justices specially commissioned to decide civil matters of the value of 20*l.*, not concerning the freehold. The ordinary expense of a suit in these last mentioned courts is 4*l.* 10*s.*

The Slave Courts are of recent establishment. They are composed of three Justices of the Peace at least, who, without a jury, may try slaves upon charges punishable by death, transportation, or confinement to hard labour for life, or to less punishment.

The law expenses and costs for prosecutions, marshals, gaols, insolvent and crown debtors for 1831, were 14,174*l.*

Uniformity of laws and proceedings cannot probably be attained yet in the West Indies, even in the purely British Colonies, although the Chief Justice of Tobago is of opinion, that "One Court Act might be framed very usefully, to do for all the islands."* But strong grounds are adduced by the Commissioners against the possibility of consolidating the Courts, or of imposing the same rules upon them all at present.†

In order to separate entirely the judicial from the legislative power, the practice of the courts, and certainly their fees, should be regulated by statute laws. Under the pretext of determining the practice, vast influence is attained by Judges. The modern course of the Colonial Office has been to divest Colonial Legislatures of their just authority in this matter; and the West India Commissioners propose to confirm this course, by giving new

* Third Report, p. 86. † Third Report, p. 110.

powers to the Judges, for "framing rules of court; such rules of court, however, to be approved and confirmed at home."* With what latitude the term "Rules of Court" to be thus made by Judges, and the Secretary of State, and not by the local Legislatures, is to be understood, will be learned by considering that the Commissioners include in it "priorities, executions, sales, and mortgages;"†—matters which, in every six years, affect nine-tenths of all West India property.

The office of Attorney-General, and the power of prosecuting for offences, vary in different colonies, and require to be placed upon a proper and uniform footing everywhere.

In Barbadoes, the power of the Attorney-General is unusually extensive. He draws the indictments; presents them to the grand jury; prosecutes the case; and sums up the evidence to the petit jury. Sometimes, after his junior has replied to the observations of the prisoner's counsel, the Attorney-General concludes the case by a summing up, the Judges never interfering in this stage. It is only from the Attorney-General's, the prosecutor's, notes, with the verbal remarks of the Judges, that the Governor obtains means of deliberating on cases brought before him for pardon.

There are, however, no *ex officio* informations in Barbadoes.

In Grenada, the grand jury will not receive an indictment except from the Attorney-General; but in Tobago the practice differs.

In Jamaica, the Attorney-General is the public prosecutor, whose sanction is necessary for every *public* prosecution; and the grand jury do not receive a bill of indictment from any other person than the Attorney-General. The Attorney-General would not prepare or send in a bill of indictment, without an affidavit taken before himself, or some other Magistrate, deposing to the facts on which the indictment was founded. Such is the evidence of the late Attorney-General of Jamaica to the Commission (*1st Rep. 2d Series, p.* 191); to which it may be added, that the reply of the Chief Justice to the question—"Does the grand jury ever receive a bill of indictment from any other person than the Attorney-General" is, "Never."—(*Ib. p.* 170.)

The power of prosecuting is not confined to the Attorney-General in St. Vincent, Nevis, Antigua, St. Kitt's, Dominica, and Tortola, according to some witnesses; but the point seems doubted by other testimony.—(*Ib. 2d Rep. pp.* 199, 202, 262.)

* Third Report, 111, House of Commons' Papers for 1826.
† Ib.

In the Bahamas, the Attorney-General exclusively prosecutes.—(*3d Rep.* p. 119.)

In Upper Canada,* the "established practice," which made it "the peculiar and *exclusive* duty of the law officers of the Crown to examine the witnesses in all criminal prosecutions," was of the most mischievous consequence to the administration of justice in the unfortunate case of Lord Selkirk's colony; and nothing could be more mischievous in a political point of view than to accompany the appointment of public prosecutors in England, or in English Colonies, with an exclusion of the highest right of presentment of any offenders by grand juries themselves, or to grand juries by any private individual who feels it to be a duty to institute a public prosecution upon his own responsibility. The enjoyment of this right constitutes a material distinction between the jurisprudence of the English and the civil law; and it will be seen, in our account of the conquered colonies, that the slowness with which the civil law rule, restraining the voluntary activity of private prosecutors, has been changed in them, has been the occasion of much misgovernment.

The judicial establishments of the conquered colonies of Demerara, Essequibo and Berbice have lately undergone extensive change, the laws remaining unaltered. Those laws, as guaranteed by the capitulation of 1803, are the old laws of Holland previous to the French revolution, subject to the vague principle, as in the English colonies, of their suitableness to local circumstances, which the *judges* acquired the power of determining. This rule included the Roman law, so far as it had been adopted in Holland; and various statutes were passed from time to time both in these colonies and at home for their government. The capital fault was committed here of leaving these laws often in manuscript, and as often unsettled, a fault which is not yet corrected. Some of the books of authority are Voet ad Pandectas; Van Leeuven, Censura Forensis, and other treatises; Matthæus, de Criminibus; Van der Linden's books; Grotius' Introduction (an admirable work written by that great man in prison); Merula, Bynkershoek, Sande, Van der Keesel's Theses, P. Bort, Lybrechts, and the Corpus Juris. The practice is regulated by the "Manner of Proceeding" enacted in 1774.† In civil cases it is in many respects good; but in criminal trials tedious. The evidence of witnesses is given in writing, which ought to be altered, by substituting for it oral examinations in open court, without, however, failing to record the testimony,

* Amos' Report of Trials in Canada relative to the Destruction of the Earl of Selkirk's Settlement. London: 1820. xiii.

† These rules are printed in the appendix to the House of Commons' Papers for 1828, No. 577, p. 203.

word for word, by short-hand writers. Independently of these laws, English statutes are applied in the courts; but under circumstances highly objectionable and illegal. "As regards the question,"* say the Commissioners of Legal Inquiry in the West Indies, "how far English Acts of Parliament are considered binding in these colonies, the President of Demerara said he considered all English Acts relating to the colonies as in force in Demerara, though passed before the colony belonged to the British government. The members of the Court of Civil Justice at Berbice stated, that English Acts were not generally considered as binding there. They enumerated the Navigation Acts, and those relating to the slave trade, as being in force in their colony. Proofs for the recovery of debts under the British act of 5 G. 2, are admitted in both colonies. It appears highly proper that this question should, by some general and declaratory act, be set at rest, for considerable variety and uncertainty of opinion appear to prevail on this head, particularly in the ceded colonies, as at Trinidad and St. Lucia, with respect to 5 G. 2, c. 7, and the act of 37 G. 3, c. 119, qualifying it. *At present the question of admissibility or not, of English Acts of Parliament, seems to rest entirely in the discretion of the colonial judge.*" A peculiarity in the criminal law has hitherto been, the enjoyment of the right of appeal, upon the weight of evidence and the whole case, from the first sentence, which is now abolished, the resort to the governor or the crown for mercy upon special circumstances only remaining. Another peculiarity in the Dutch criminal law is the tedious continuance of trials from day to day; which, with the practice of deciding with closed doors, and without giving reasons for the judgment, ought to have been altered long ago in all the conquered colonies.

The recommendations of the Commissioners, in regard to circuits from colony to colony in the West Indies, have not yet been adopted beyond Trinidad and other southern conquered settlements. The following abstract of recent parliamentary papers will show the plans which are in progress upon this subject; but it is probable that more discussion will be necessary in order to a satisfactory settlement of its difficulties.

By an order of the King in Council of the 23d of April, 1831,† each of the courts of justice at Demerara, Essequibo and Berbice, the court of criminal trial and of first instance, of civil jurisdiction in Trinidad, and the Royal Court of St. Lucia, were directed to be holden by the President of the Court of Demerara and Essequibo, by the Chief Justice of Trinidad and the First

* House of Commons' Papers for 1828, No. 577, p. 3.
† House of Commons' Papers for 1832, No. 432.

President of St. Lucia, or their temporary substitutes, in at least two yearly sessions, at the Governor's appointment. When assembled, the judge is to be president of the assembled court in whose colony it is sitting; and the jurisdiction and powers of the assembled court are to be such as the present judges have respectively, the decision of the majority being taken as the judgment of the whole court. In criminal cases three assessors are to sit and vote with the judges. In the absence of the judges on the circuit their respective courts are to be held by a vice-president, to determine interlocutory matters in suits already depending, and to report to the judges in circuit upon any questions referred by the assembled judges to such vice-presidents. And their orders are subject to the review of their respective supreme courts. The order then abolishes numerous inferior functions, or transfers the duties of the officers to the new judges; and establishes minor courts of limited jurisdiction.

By a second order of the King in Council of the 20th June, 1831, the foregoing plan of a circuit is suspended at the discretion of the governors; and the establishment of a chief justice, and of a first and second puisne judge, is substituted for it. In criminal cases the assessors are to vote with the three judges; but the judges may reserve any question of law for their own subsequent decision, apart from the assessors. The appointment of assessors is accommodated to the old rules of the respective colonies for supplying the old courts with the numerous judges who used to be assembled on the bench; but the English rules of challenge are introduced. The chief justices are to make tables of fees, subject to the governor and council's confirmation; but the governor and council are to make rules of proceeding in criminal trials, subject to the king's approval.

This order in council abolishes further jurisdiction, used in the old courts, such as the tribunal of appeal in capital cases.

At Honduras, one of the irregular class of our colonial establishments, there is exhibited a strong illustration of Lord Stowell's remarks, that limitations must be set to the six propositions, which, in Campbell v. Hall, were laid down by Lord Mansfield as the basis of the law of English colonies; and it is matter for regret that Lord Camden's reasons for resisting Lord Mansfield's views have not been preserved. One of the propositions is, that British subjects cannot settle abroad without the King's sanction. Nevertheless in the *unsanctioned* settlement of Honduras, from its establishment, and before the British government gave its protection, the inhabitants formed an assemblage to enact laws, which remain in existence to this day. In 1765 the people covenanted together to abide by such regulations as might be made by the justices, (elected annually by the inhabitants,) after

being approved by the majority of those inhabitants. Since 1809 further additions to the laws have been made by the inhabitants at their public meetings, by committees created for that purpose, and by the magistrates presiding in several tribunals, instituted by popular agreement, about the year 1787. The manner of making the laws is this: where an individual of the community desires to introduce a new regulation, which is to be solemnly enacted, he causes a public notice to be posted in the Court House, calling a meeting of the magistrates and inhabitants, to take place twenty-one days at least afterwards. Then, after discussion, the majority of those present determine the question. After this, if the measure receive assent, and be approved by the superintendent, (the King's governor), it is considered as law. These meetings are called courts; and they are conducted with much decorum. By 59 G. 3. c. 44, a judicial tribunal, with the governor as president, was appointed by parliament for the trial of murders, manslaughters, rapes, robberies, and burglaries; but the mass of legal business is transacted in other courts established *by the people* about the year 1787; and from these last courts, as well as from the other, appeals lie to the King in council. The governor exercises the supreme controul over criminal cases in these voluntary courts; and some of the officers in them are now appointed by the crown, whilst they administer local laws made by a voluntary legislature. However irregular then these courts and laws may be, it is impossible that any tribunal could set them aside; nor can there be the slightest doubt that the usage upon which they stand has acquired a legal sanction.

One judge, or justice of the peace, with a jury of three inhabitants, determines all cases under 10*l.* in value; and also cases of assault and minor offences with a jury of twelve. A superior court of three justices at the least, with ordinary juries, civil and criminal, (except grand juries, which are not summoned,) decides other cases not within the jurisdiction of the court appointed by the statute of 59 G. 3. c. 44. In all the courts the business is done without professional aid, the parties being heard in person; and paupers obtain gratuitous redress by application to the court. The laws of England applicable to the circumstances of the people are in use at Honduras; the statute of 5 G. 2, passed to facilitate the recovery of debts in the colonies, is pursued; and a representative of the crown now resides in the place as superintendent, or governor; so that, although this settlement has not the foundation of a regular colony, it is far from being disowned on that account by Great Britain. The people are anxious to enjoy the usual sanctions on proper terms; they desire to have certain privileges abolished, as that of the freedom of the

military from the jurisdiction of the courts; and, they would doubtless be glad to see a complete separation between the judicial and other authorities. In any change that may be contemplated, some few points deserve more consideration than the commissioners of legal inquiry in the West Indies seem to have given to them. Grand juries are not required in the minor courts, which is clearly an improvement. When assembled at the supreme court, they do not make voluntary presentments. They only find bills of indictment; a restriction which deprives them of much of their usefulness. The grand juries, however, examine witnesses *on both sides*, as in some other West India colonies; the effect of which innovation deserves further consideration. The commissioners condemn it somewhat summarily. The officers of the courts, as might be expected, are upon the lowest possible scale, viz. a police officer, or constable; a clerk of the court and assistant; and a provost marshal, or sheriff; and the expense of the whole establishment is small in salaries, but official fees are inordinately high.*

The authority of governors in the administration of law, is various in different colonies. No authority of this kind can be derived from any other source than the king's commissions, or acts of the legislature. Statutes are seldom difficult to be understood upon this head; but under commissions, combined with other circumstances, such as the imperfect establishment of courts of law in colonies of British foundation, and the transmission of the extensive powers of former governors in conquered colonies, it is sometimes less easy to determine the limits of the executive in matters of justice. As a general rule, it is clear that governors cannot legally interfere with the police, the magistrates, and the courts of law in cases of ordinary occurrence. So long ago as in the seventeenth century it was a well understood principle,† that the establishment of courts separate from a governor relieved him from magisterial and judicial duties. The power of pardoning condemned parties, except in murders and treasons; and the power of respiting convicted murderers and traitors until the king's pleasure be known, being usually vested in governors, the calm and fair discharge of those powers would be endangered if the mind were prejudiced by a preliminary activity in prosecuting the accused. The interposition of the executive through the *noli prosequi* of an attorney-general, is regulated by the same principles as prevail in that branch of the prerogative in England.

These remarks are supported by the usage in the West Indies,‡

* Third Report of the Commissioners, 2d series. House of Commons' Papers for 1829, No. 334. p. 98, 100, 101, 105, &c.

† Dutton v. Witham, Shower's Parl. Cases.

‡ 1st Report of Commissioners of Legal Inquiry. House of Commons' Papers

where special statutes are passed, when, in particular cases, governors are made criminal judges. In Jamaica, the governor does not grant pardons or respites, without requiring a communication of the circumstances from the presiding judge, with his opinion; and in all but capital cases, sentences are there carried into effect without being submitted to the consideration of the executive government. In Demerara and Berbice, the governor may exercise the power of causing a person to be apprehended *in flagranti delicto*, or for political offences; but he cannot suspend the proceedings of the courts, or delay trials. In the former colony, he has the power of removing dangerous persons; in Berbice this power is limited by the king's instructions to the time of war. (Second Report, House of Commons' Papers for 1828, No. 577, p. 83.) At the Cape of Good Hope, similar powers were continued most improperly from the Dutch authorities unnoticed until the Commissioners of Inquiry suggested the propriety of change.* Since that recommendation was made, the ordinary administration of criminal as well as of civil law, has been left to the magistracy and courts of justice, although the power of political removal is not yet abridged. The administration of criminal law in New South Wales is of more direct importance to Great Britain than that of any other colony. So long as transportation shall be continued as a secondary punishment, it will be a source of disquiet to us if the local government do not give satisfaction to the colonists of all classes by not permitting the law to be duly administered. The provision for its administration is, in some respects, complete. Courts, judges, law-officers, and magistrates, with the Governor in the last resort to warrant the execution of great criminals, or to dispense pardon upon fitting occasions, constitute a regular, well understood and constitutional legal machinery. The difficulties hitherto opposed to the introduction of common law juries have not in all respects prevented the progress of good principles, although the errors of individual governors may have checked the application of those principles in practice.

All the magistrates are appointed by the governor, and a few attached to particular police stations, where the rest periodically assemble in petty sessions, receive stipends. They have the aid of constables armed with the common law powers of English constables; and they sit in quarter sessions with juries, and with

for 1825, No. 517, p. 117, 207, 218, and 252, for Barbadoes, Grenada and Tobago.—Ib. 2d series for 1827, No. 559, p. 164, 183, 193, and 315, for Jamaica. And for St. Vincent, Dominica, Antigua, St. Kitts, Nevis, Tortola, and the Bahamas, see ib. 2d Report, Papers for 1826, No. 276, p. 519, and 262,—3d Report, Papers for 1826, No. 36, p. 125; and 3d Report, 2d series, Papers for 1829 No. 334, p. 120.

* House of Commons' Papers for 1827.

a barrister, paid by the government. If chosen by the bench, the barrister becomes their chairman; if not chosen, he takes part in the proceedings only as the other justices. In many cases, the justices have summary judicial powers; but two must concur in sentences upon criminal convicts, beyond a certain degree of severity. In cases in which the justices have not judicial jurisdiction, the depositions which they take upon criminal accusations are sent to the attorney-general, who, under the act of 4 Geo. 4, c. 96, and later, New South Wales Act, represents the grand jury. These statutes do not specify the limits of the attorney-general's duty; and hitherto his office has been discharged by analogy only to the course pursued in England. Upon indictments or informations being preferred, the prosecutions are conducted by the attorney-general, or solicitor-general, or by other counsel retained by the crown, or by private parties, in the same manner as in England. The trial takes place before one or more of the judges, with a jury hitherto of seven military officers. The judges have authority to record sentences of death in cases in which they consider no question can be entertained as to the actual execution of such sentences; and the governor interposes only in the cases wherein capital punishment ought by law, as in murders, or by the opinions of the judges, to be inflicted. In these cases, the warrant of the governor is required for the execution, and in all others he may interpose for mercy. He also interferes before trial upon certain emergencies, as to offer rewards for the apprehension of great delinquents, or for appointing special times for the courts trying particularly atrocious offenders.

The progress towards this salutary division of power has been steady. In the first few years after the foundation of the colony, the governor acted as a justice of peace, being authorized to do so by his commission from the king. Subsequently he received no such commission; and the administration of justice was left to the more proper course of independence of the executive, except in the before mentioned instances, the governor then constituting an authority exercising only a qualified supervision over the law. This point was inquired into by the transportation committee of the House of Commons in 1812, of which Sir Samuel Romilly was a member, and the result of that inquiry was satisfactory. Afterwards, Governor Macquarie committed a great fault, by breaking in upon the good principle, and the established usage, in two cases. His recall was partly attributable to the error which, as we have seen, was opposed to doctrines long settled in English law. Mr. Biggs, the commissioner of inquiry,*

* House of Commons' Papers, for 1823, No. 33, p. 53, 56, 75.

puts the subject in a strong and just light; and for several years no difference of opinion arose upon it. In 1826, however, new views were entertained by the governor of that day, which led to disputes which have since been much before Parliament and the King in Council, and are now waiting a decision.

It will be convenient, in this place, to examine the foundation, the limits, and the character of the authority exercised in England over the colonies. At no period has the supremacy of Parliament, for certain purposes, over them, been doubted. In the years 1767-8, at the height of the old American discontents, the House of Representatives of Massachusetts declared with protestations of "sincerity," in their petition to the King, "that his Majesty's subjects of that province ever had acknowledged, and still acknowledged, the High Court of Parliament as the supreme legislative power of the whole empire."* After the unhappy claim of more than such supremacy had failed, the statute of 18 Geo. 3. c. 12., in which the right of taxation was abandoned, did not contain a further renunciation; and to this day a special legislative supremacy exists unimpeached. Hence acts of Parliament are from time to time passed upon Colonial affairs; and both Houses of Parliament exercise various checks over them, either when voting money, or upon complaints of general or particular grievances, or in calling upon the King to prosecute delinquents. Examples upon these and other heads will be introduced into our notice of the legal constitution of the colonies.

The principal home administration is vested in the Crown; and is exercised at the Colonial Office, in Downing Street, in civil affairs; at the Treasury in financial affairs; and, in military affairs, through the Secretary at War, the Commander in Chief, and the Master-General of the Ordnance. The regulation of the Post Offices depends upon the Postmaster-General; from the Colonial Admiralty Courts appeals lie to the High Court of Admiralty in England; and the Lords Commissioners of the Admiralty regulate the Naval Forces stationed abroad. Over all these authorities the King in Council is supreme; and, whoever has cause of complaint in any of these departments, is entitled to redress at the King's hands, through the medium of the Privy Council, in addition to the remedies by action and indictment. The form in which such redress is to be sought is by petition to the King in Council, which petition should be presented to his Majesty by the Secretary of State for the Home Department, or by any other minister. If, on such application, repeated replies

* A true state of the proceedings in Parliament, and in Massachusetts Bay, relative to granting the money of the people of that province, and of all America, in the House of Commons, in which they are not represented, Folio, 1774, p. 6.

be received by the complainant, that the King has not been pleased to give any orders on the petition, the party should then present a petition to either House of Parliament, stating the case, with the fact, that the ministers have not advised his Majesty to do justice, and praying the interposition of the House with the King, that he will refer the case to a committee of the Council for inquiry, or cause justice to be done in some other way to the complainant. Objections are often made against complaints being brought into the House of Parliament as to appellant courts of justice. Such objections cannot, however, be urged to the foregoing steps, which are taken upon the principle that the executive government has neglected a plain duty; and, when justice is denied, there is an obligation on Parliament to enforce the performance of it.

At present, the great scene of the administration of colonial affairs at home, is the Colonial office, in Downing Street; the duties of which will be learned from the legal character of the establishment to which it has succeeded. Until the year 1784, that administration lay with the Board of Trade and Plantations, formed by successive commissions, subject to the Committee of the Council for Plantation affairs; which Committee still exists in its original state, but the Board has been stripped of its colonial administration in favour of the Secretary of State for the Colonies. Before the revolution of 1688, such a Board had been formed, the first traces of it being perhaps early in the reign of Charles the First. It was adopted with some improvements by the Parliament in 1643,* and revised in 1671 and 1672 by Charles the Second. Distinguished men were among its members, and the public records may be searched with much advantage for the results of its labours. In 1696 a new commission again created this Board; and, during several years, reports of its proceedings were laid before Parliament, by which course regular checks were imposed upon the administration at home and abroad, the loss of which has greatly injured the public service in later years. In the twelfth volume of the Journals of the House of Commons, p. 70. A. D. 1697, may be seen "a copy of the commission and instructions of the Council of Trade," presented to the House by its Secretary. The commissioners are thereby ordered, from time to time, to make representations of their proceedings to the King, or to the Privy Council, to be signed by four of them. They were "to take possession of the records in the Plantation Office, and to inform themselves of the condition of the plantations, as well with regard to the administration of the government and justice in those places, as in rela-

* Declarations of the Parliament, Folio, A. D. 1663.

tion to the commerce thereof; and also to inquire into the limits, soil, and produce of the plantations, and how the same might be improved; and of the best means for easing and securing the Colonies, and how the same might be rendered most useful to England and to examine the usual instructions given to the governors of the Plantations, and to see if any thing might be added, omitted, or changed therein to advantage; to take account yearly, by way of journal, of the administration of the governors, and to draw out what is proper to be represented to the King, and to consider of proper persons to be governors, or deputy-governors, or to be of the councils, or counsel at law, or secretaries in the plantations, in order to present their names to the King in Council; and to examine the laws of the plantations, and to consider what matters may be fit to be passed in the Assemblies there; to hear complaints of oppressions and mal-administration in the plantations, in order to represent what in their discretion they should think proper. For these purposes they were to examine witnesses on oath, and from time to time report their proceedings to the King, or to the Privy Council, as might be required by the nature of the thing. Upon urgent occasions the Lord Chancellor, the Secretaries of State, and other ministers were to attend; and the law officers of the Crown were to be consulted if required."

The plan of government indicated by these instructions was the result of much consideration. Lord Somers had taken great pains upon the subject, and an endeavour was made, in 1696, to pass an act of Parliament upon the Plantations and Trade. Although that endeavour was not successful, the subordination of the home management of colonial affairs was settled, and carried into effect by frequent reports, (to be seen in the printed journals,) until the influence of Lord Somers and his party gave way to less liberal ministers. Those reports contain summaries of the progress of the Colonies; the questions arising in regard to them; whether complaints were made, and how those complaints were settled. Such statutes as that of 11 and 12 Will. 3, c. 12., for securing the punishment of delinquent governors, arose from the recommendation of the commissioners.

To those who were dissatisfied with the decision of the Board of Plantations on any point, there existed the right of applying to the King, who referred the complainant to the Committee of the Council on Plantation Affairs, and further redress could be had at the Council generally. All complainants seem to have been heard, as a matter of course,* by themselves, their agents, or counsel, at

* So early as 1632, it was successfully urged, at the Privy Council, in regard to the Irish *Plantations* and Government, then substantially colonial in this point, that com-

the Board, and in the other stages of complaint; and, when the opinions of the law officers of the Crown were required, they ordinarily heard the parties, in like manner, in cases of difficulty. This excellent system was, indeed, the reverse of that which now prevails in the colonial office; and instructive examples of what occurred exist in manuscript,* or in the histories of particular colonies, such as that of Barbadoes by Porny, and the like. Where the parties considered themselves not to have obtained justice from the ordinary administration, they resorted to Parliament.

Mr. Burke's reform, in 1782, not being followed up in the manner anticipated, the Committee of the Privy Council managed colonial affairs for about two years; but, in 1784, they were transferred† to the unsatisfactory course which has been since pursued by the Secretary of State; the labours of a century and half in favour of good government, on this head, being completely frustrated. Instead, for example, of proper persons to fill colonial offices being considered of by a Board in order to be submitted *to the King in Council*, as the instructions of 1696, improving upon those of 1672, and 1643, direct, the appointment of functionaries for the Colonies has become almost an acknowledged matter of patronage, in defiance of the law of the land.‡ Abuses also in the Colonies are directly fostered by the precariousness§ of redress of wrong, and the extreme difficulty experienced by complainants to obtain even a hearing; while all improvement in the laws and condition of the Colonies is necessarily impeded by the system to which they are subjected in Downing Street. The sagacious remarks of Mr. Bentham, made thirty years ago, and never too often to be repeated, have, indeed, been abundantly justified by subsequent experience, and by the abuses

plaints of injustice should always be *heard* by the King in Council, if the party had only first sought redress on the spot complained from.—Manuscript in the Library of Doctors' Commons, and see Lord Strafford's trial on the point.

* The Report of the Library Committee of the House of Commons, of which Sir Robert Inglis was chairman, (Papers for 1832, No. 600.), recommends, that the House should be supplied with a full series of the Privy Council cases; the recommendation is wisely made, and the whole subject connected with it demands early attention.

† The succession of the Secretary of State for the Colonies to the powers, and of course to the duties of the Board of Trade, is illustrated by the Consulates in the Barbary States, which were under that Board, being now subject to the Colonial Office. Those Consulates are, however, diplomatic, and should be connected with the Foreign Office. The subject is of the highest interest in regard to the extension of civilization in Africa; and Mr. Hume has done well to call for papers on it, as he did on the 10th of August last.

‡ 12 Rich. II. c. 12., and Fleta; and see the Impeachment of Lord Macclesfield, *passim*.

§ See Preface to Serjeant Rough's case, 8vo.; and the debates of the House of Commons on the case of Mr. Willis.

now flourishing in rank luxuriance and in the very face of promised reform.

"Les plaintes les plus graves des colons, affoiblies en raison de la distance, sont livrées sans défense dans le cabinet du prince aux tournures les plus insidieuses. * * * Les moyens abondent pour deguiser au prince les procedés les plus violens, sous une apparence de necessité: et les meilleurs intentions ne peuvent pas préserver les ministres du danger de servir des intérêts particuliers aux dépens des intérêts publics."—*Theorie des Peines et des Recompenses,* tom. ii. p. 328.

Upon the present system there is a moral certainty that the most flagrant faults in the government will escape even notice. To ensure their correction, there must arise the concurrence of circumstances, only to be looked for once in three quarters of a century. First, some colonial functionary, or unhappy colonist, must have motives for entering upon the exposure of abuses, at the risk of ruin; secondly, he must be a person of rare sagacity and correctness; thirdly, he must have health and spirits capable of enduring years of vindictive opposition, and of honestly resisting the temptation of base but profitable compromises; fourthly, members of Parliament must be found willing and able to pursue the case; and, fifthly, the state of public business must be such as to prevent remote colonial affairs being postponed to the greater interests, which press upon the attention of Parliament and the public. Under these circumstances, it is plain, that official delinquents will rely as much upon their great chance of escaping even inquiry, as thieves calculate upon the many loop-holes between them and the gallows. There is no means of mitigating these evils, except by reviving parts of the olden system; by regular reports of the home colonial administration being laid before Parliament, but especially by turning the English and Colonial printing press to a proper account, and publishing * more details of colonial affairs, and by facilitating access to a reformed Privy Council for the redress of colonial grievances.

The communication between the Colonies and the home administration is partly carried on by means of colonial agents, whose especial duties will be noticed hereafter. They are of two classes, namely, those appointed by the Colonies where there are popular legislatures, and those appointed by the Secretary of State where there are no popular legislatures. The importance of these agencies may be inferred from the fact, that such men as Franklin, Burke,† and Huskisson held them.

* For example, vacancies in colonial appointments, and the names and pretensions of the candidates, with the causes of the vacancies, might be announced in the Gazette with great advantage.

† A most interesting Collection of Letters, written by Mr. Burke, when agent for New York, is said to be still in existence in manuscript.

ART. V.—*Copy of the Third Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property.* Ordered by the House of Commons to be printed. 1832.

In our last number we treated, at some length, the subject of Registration, and we referred our readers to the second Report of the Real Property Commissioners, which, with its Appendix, contains a valuable mass of evidence on this most important of all the questions that have yet been taken into their consideration. We also undertook in our review of the Parliamentary proceedings of the last session, to offer some remarks in our next number on the Third Report of the Commissioners, which had been recently presented to Parliament; and in fulfilling that promise we think it necessary to obviate, by some prefatory observations, the feeling of disappointment which may probably arise upon the first inspection of the volume before us. We are really desirous of doing ample justice to the labours of those gentlemen who have exerted themselves in no ordinary manner, both to disembarrass the cumbrous system of our law of real property of its antiquated forms, and to establish the complex rights and interests, which the liberality of modern statutes and decisions permits to co-exist in the same property, upon a plain yet steady and secure foundation. They have endeavoured to attain the first object, by the abolition of fines and recoveries, real actions, and certain unreasonable rules of descent; all of which may indeed be accounted for by history, but the same history teaches us that our age differs materially from that to which we owe such portentous births, and that it is time for us to consign these relics of antiquity to the shelves of the library, as we hang up the armour of our ancestors in the hall. The security and simplification of the various interests in real property will, we had almost said, be accomplished, but certainly in an unprecedented degree promoted, by general registration, the subject of the second Report of the Commissioners. They have thus far, therefore, evinced a disposition to advance beyond those Herculis Columnæ, inveterate prejudice, and mistaken notions of self-interest; and we have some ground for concluding *à priori*, that if we be disappointed in our anticipations of their future course, the disappointment must be owing, in some degree, to the more formidable nature of the obstacles that have arrested their progress. We shall find that such obstacles have, in point of fact, embarrassed the authors of the present Report in their treatment of the principal topics which it embraces, namely, copyhold tenure, perpetuities, and the law of covenants; for, where more than ordinary reasons

against alteration do not exist, as in the minor incidents or local and customary qualities of tenure—the doctrine of contingent remainders—and (above all) the restriction of the at present imprescriptible rights of the church, the Commissioners have evinced the same steady good sense and freedom from prejudice which have characterized their former labours, and preserved them alike from inconsiderate precipitancy, and vacillating indecision.

The real and substantial difficulty which opposes itself to the reformation of all abuses in the laws of civilized communities (in which alone reformation is ever demanded), consists in the complexity of rights gradually introduced by the varied wants of mankind as they advance in refinement, and the consequent multiplication both of well-founded and imaginary alarm at every proposed alteration. The first laws that regulate the transmission of property are as simple as the necessities that dictate their adoption. The first and most simple title, that of occupancy, gives way to one more compatible with tranquillity of possession, such as a grant originally testified by a symbolical delivery of possession in the presence of the neighbourhood, afterwards by written documents, or generally by both. These grants are usually made by the heads of the state, and emanate from the sovereign powers; and they are then imitated by the chief proprietors, and a series of sub-grants or sub-infeudations (as they are termed where the feudal system has prevailed) gradually parcel out the property of the nation or tribe. In the first instance the right of property is conferred on the grantee for life only; and the state, or in case of a sub-grant, the chief proprietor, upon the death of the grantee, resumes the vacant possession. The inconvenience, however, of such a perpetual shifting of property from stranger to stranger, introduces the law of inheritance by the children of the defunct, which is slowly extended to the collateral kindred of the childless, a fine or other recognition of the primary right of the state or chief proprietor being in most, and we believe in all, feudal countries, exacted upon each descent. The right of alienation is very slowly conceded, and wherever the primary right of a chief proprietor is recognized, his unwillingness to lose the various fruits of tenure as they are termed, which fall in upon the death of his tenant, will make him watch the change of ownership with a jealous eye. He will either reserve to himself the right of dissenting from any proposed substitution, or, at any rate, will only permit such simple transfer of the property as will place him in nearly the same situation as before the alienation. The right is therefore at first usually confined to such simple transfer, and it is only in a more advanced stage of society that partial interests (for life or years) are allowed to be carved out of the estate. Estates upon condition are the first steps to such a

change, where the *whole* property is transferred, subject to a resumption of the *whole*, by the grantor or his heirs, upon a given event, which method obviously leads to a limitation by way of remainder, instead of condition, on the death of a given person or the failure of heirs of a given description, or the like. Nor, indeed, is the jealousy of the chief proprietor the sole cause of such restricted right of alienation; another concurrent reason at this period of society, is found in the necessity of rendering the title simple, so that it may be borne in the *memory* of the neighbourhood, the only record of rude nations, from which circumstance the word *record* is itself derived. For it should never be forgotten that in every age and in every country the necessity of a notoriety of title has been recognized, and in no country more than our own, the legal history of which presents a combined series of efforts to arrive at so desirable a result; but enough of this may be seen in our former number on Registration, and the authorities there referred to. To resume our sketch of the modifications of the law of real property;—we find that as soon as the energies of a nation cease to be directed to the repelling of foreign enemies, the middling classes have been elevated, both *comparatively* by the depression of the great proprietors in the usual course of civil dissension, and *positively* by their own patient industry, a necessity is experienced of a relaxation of the laws restricting alienation; in order first to encourage the improvement of the soil, and to meet the various exigencies of commerce, and then to gratify even the caprices, which the totally altered nature of ownership, and the now established right of property have generated. For the origin and reason of the right are forgotten, and more than one proprietor will be disposed to think that he has an unbounded liberty "to do what he will with his own:" hence a demand for an unrestrained control over property, either by the act of the owner in his lifetime, or by will, to operate even after death—hence, also, every possible variety of interest is at length allowed to co-exist in one and the same subject. It is then that the frame work of the settled law must be re-modelled, and if it be too stiff to yield to the required transformation, either a new system will be gradually built up, which may at some future period be substituted for, or amalgamated with, that which preceded it, or else some political convulsion will overthrow the ancient fabric, and it will be left to the victors to construct their own edifice on its ruins.

Now, although in tracing the above hasty outline of the progress of the law of property, we have kept the eye fixed, as it were, upon our own legal history, yet a very cursory glance at the various modifications of the law which have successively taken place in every civilized state, ancient or modern (as far as

they are ascertained), would be sufficient to prove, that if the sketch require filling up, still it is not materially incorrect. Our limits will not permit us to undertake the task, but it is not uninteresting to observe the correspondence of the steps that led to a similar result in two fundamentally different systems of law. The strict simplicity of the old Roman law of testaments merely permitted an entire alienation of the whole inheritance (for the *legal* substitutions, the *vulgaris, pupillaris,* and *quasi pupillaris,* form no real exception to this rule); and the party or parties taking the gift were bound to pay the debts of the testator. This rigour gave rise to the *fidei-commissum,* or *use* (as it would have been translated before the statute of Henry VIII.), by which the estate vested in the legal heir was to be nevertheless disposed of as the testator should direct. These uses or trusts depended on the good faith of the trustee, until Augustus directed the Consuls to provide for their execution, which jurisdiction was afterwards transferred to the Prætors by Claudius. But as the devisee in trust became subjected by the strict law to the payment of the debts of the deceased, it now became necessary to permit actions against the *cestui que use,* which was done by the *Senatus-Consultum Trebellianum.* In the above outline we trace the history of our own struggle whilst shaking off the yoke of feudal rigour, from the invention of the *use* down to the statute 1 Ric. 3, which give an action against the *cestui que use;* and the parallel is not the less interesting on account of the Roman system being probably in this respect imitated by the monkish lawyers; for the only points to which we wish to direct attention are, 1st, the fact of there being a period in the history of all countries, when the varied wants of mankind require a variation in the original system of law; and 2dly, the silent and gradual mode in which such alteration is effected, when circumstances do not admit of the total overthrow of the ancient forms.

The attempt at perpetuities under the Roman law, by the indefinite extention of equitable substitutions, may serve to show that the common caprices of mankind will, no less than their common necessities, tend to produce a resemblance in the leading events that characterize the legal history of nations widely separated from each other, as regards every superficial distinction.

In the countries which have adopted the Roman law, the equitable and strictly legal jurisdiction, or, we should perhaps rather say, the ancient system, and its modernized adaptation to existing necessities have by degrees coalesced. In our own country there appears to have arisen from the earliest period a marked distaste for any foreign system, and the laws of the Saxon Edward were earnestly and incessantly demanded, whilst every doctrine derived from those compiled by Justinian was as energetically repudiated.

The real necessities, however, of mankind prevailed, as they always will, over all unfounded prejudices, and the system of uses rose silently on this broad foundation, until at length it appears to have been intended by the statute of Hen. 8, to incorporate it with the older fabric. Although this effect, if intended, did not take place, yet was a most important change introduced in the law of real property. It is in the most confined sense that we must understand the saying attributed to Lord Hardwick, that "the statute only added three words to a conveyance;" for though these magical words could, at the option of the parties, place those rights under the protection of the chancellor, to which the common law courts had denied their assistance, yet did the statute introduce into the common law itself the whole machinery of springing, shifting, and resulting uses, and all the varied modifications of real estate which can now be achieved without the aid of a court of equity, through the medium of a conveyance by lease and release, and the reservation and execution of powers. But the feudal law could not, or would not, wholly amalgamate with the new practice, and consequently it was again left to the Chancellor to assist the efforts of a nation advancing rapidly in wealth and refinement to overstep the narrow limits prescribed by antiquated decisions to the free alienation of property. Many a struggle took place between the courts of law and equity, ere this could be effected to the extent required by the growing exigencies of a free commerce, to use that word in its largest sense. The important doctrine of *attendant terms*, for instance, an awkward substitute for the protection of a register, was not finally settled till near the middle of the last century; and when we reflect upon the determination of the courts of common law, to shut their eyes on the production of a merely equitable title, we shall feel that without some such apparatus the Court of Chancery would have had great difficulty in protecting its rising nursery of trust estates from the chilling effect of feudal rigour. Now, however, that the courts of equity have, to a certain extent, satisfactorily accomplished their task, it remains to be seen whether some simplification cannot be achieved in the results at which we have arrived, effected as they have been by the complicated machinery of two entirely independent tribunals, each of them occasionally overstepping the boundary that separates the judicial from the legislative functions, and the more ancient at first watching with jealousy or thwarting, but latterly, as light has broken in upon it, endeavouring at times even to outrun its rival in its march towards the *liberalisation* of the law. Such simplification appears to be the task imposed upon the Commissioners, and they have taken one bold step, without which

they could not and cannot advance, namely, the resolution to propose General Registration; of the paramount importance of which we entertain so strong a feeling, that it seems to us alone sufficient to avert the growing storm, which may otherwise overthrow at one swoop the whole mass of legal lore now piled upon our shelves, to the great peril of the property which it at once shields and encumbers.

We fear that we may be thought to have extended our preliminary remarks to an unreasonable length. They will, however, assist us materially in laying before the reader the matters treated by the Report, to which we will now at once apply ourselves; taking, for our more immediate subject matter, the propositions annexed to it, as the result of the consideration bestowed by the Commissioners on the various heads of law embraced by the Report itself.

These propositions are classed under the three general heads of Tenures—Contingent Remainders—Future Estates and Perpetuities, and Covenants. In the body of the Report, however, there are suggested several important alterations, as regards the limitation of actions for the recovery of ecclesiastical rights, suggestions which every well-wisher to the establishment will earnestly desire to see pressed upon the early consideration of parliament. The first general head, that of Tenures, comprehends thirty-seven Propositions, arranged under the four subdivisions of Escheat—Tenures and Customs to be abolished—Enfranchisement of Copyholds—and Customary Freeholds.

The Commissioners have not thought it right to interfere with the general principle of Tenure, and after stating that the main grievances of Tenure have been abolished by the statute of Charles II., they proceed to say:

"Some few inconveniences arising from the principle of Tenure still remain, but we think they may be remedied by specific enactment. Although tenure, which was introduced for the military defence of the kingdom, has long survived its principal object, its consequences so deeply and extensively pervade the whole system of our law of Real Property, that the abolition of it would be an innovation too dangerous to be prudently hazarded. The necessity would immediately arise of providing by positive enactment for all the rules deduced from tenure, which it is intended to preserve. Some of these, notwithstanding the greatest care, would probably escape attention; many questions would arise upon the meaning of the terms in which the existing law would be declared, and all the dangers and evils of codification would be encountered without its advantages."

We confess that there appears to us to be much practical good sense in this reasoning. Sir Mathew Hale, in his admirable tract

on the Amendment of the Laws, lays down these fundamental rules for the guidance of the reformer:—

"1. That the change be demonstrable to be for the better, and such as cannot introduce any considerable inconvenience in the other end of the wallet.

"2d. That the change, though most clearly for the better, be not in foundations or principles, but in such things as may consist with the general frame and basis of the government or law.

"3d. That the changes be gradual and not too much at once, or more than the exigence of things requires."

The resolution of the Commissioners is borne out by the two former rules; for, in point of fact, the doctrine of tenure, as applied to freehold property, is now productive of little practical inconvenience; whilst its abolition, being a shifting of the first principles or foundation of the law of real property, may occasion a flaw in many a compartment of the complicated superstructure. The cases upon escheat, the principal burden now arising from tenure, are extremely rare in modern law-books; and it is chiefly where the illegitimacy of the last owner deprives the collateral kindred of the advantages otherwise enjoyed by collateral heirs, that any hardship can be felt. This evil has been practically avoided by the liberality of the officers of the Crown, since the statute 39 and 40 Geo. 3, c. 88, s. 12. It may be questionable, on the ground of public policy, whether any more direct favour should be shown to this species of relationship. The Code Napoleon bestows only a portion of their parent's property on natural children;* but in the event of a bastard's death, the parent, who has acknowledged him in his lifetime, succeeds to his property, and if both parents have done so they divide it,—a regulation which certainly has its advantages in stimulating the parent to a duty too often neglected where it is most required. If such parents be dead, the legitimate brothers and sisters take such portion as the bastard may have inherited from his parents, and the illegitimate brothers and sisters divide the rest. If there be no such relatives, as no further provision is contained in the Code, it is to be presumed that the state would become entitled as the ultimate heir. With regard to escheat by *corruption of blood*, we hope to see the good work begun by the 54 Geo. 3, c. 145, completed by the total annihilation of this barbarous remnant of feudalism, which is now confined to cases of treason, petty treason, and murder. We are aware that treason has been considered a ground for such forfeiture in countries where the feudal law has not prevailed; but as, independently of many other arguments, we do not see how the child can, under any

* Liv. iii., tit. 1, c. 4.

ordinary circumstances, arrest the guilty courses of his parent, nor the probability of a man hesitating to stake his property on the same cast as his life, we do sincerely expect to witness in our time the extinction of this class of escheats. There is no reason, however, to deprive the Crown (which, with a Reformed Parliament, must mean the *state*) of the escheat on an absolute failure of heirs.

We will now proceed to consider the Propositions on Tenures more in detail, premising that the Commissioners have in their Report recommended the abolition of express and implied warranties, although no proposition to that effect is subjoined, probably owing to the intention they have announced of considering the practice of conveyancing at a future period.

Escheat forms, as we have said, the first subdivision of the Propositions on Tenures, and of the seven distinct propositions under this head, the first, in effect, abolishes this fruit of tenure, as regards mesne lords, by vesting all escheats in the Crown, unless the mesne tenancy be evidenced by a quit rent. The remaining propositions proceed to settle the questions agitated in Burgess v. Wheate, by declaring that escheats of the legal estate shall be subject to the existing trusts, and that the lord shall have by escheat the equitable estate of *cestui que trust* dying without heirs. They then give the lord the benefit of terms attending the inheritance of escheated lands, and vest in the Crown the equitable interest in all trust terms, where there are no next of kin of an intestate *cestui que trust*.

The six next propositions under the head of "Tenures and Customs to be abolished" are sufficient, we think, to show that where a real inconvenience exists, which can be eradicated without any change of fundamental and general principles, the Commissioners have not been alarmed by a senseless outcry against innovation. Accordingly they propose to demolish, with an unsparing hand, such local customs as have not twined themselves round the common institutions of the whole country. Amongst these are Borough English, Gavelkind, all unusual modes of descent peculiar to any particular districts, all local customs of curtesy and dower or free bench, and the tenure of ancient demesne, the courts of which are to be converted into courts baron. The vexatious custom of heriots is also proposed to be commuted for a money payment, as injurious to the tenant without any corresponding advantage to the lord. We need scarcely exert ourselves to prove the advantage of these alterations, and shall only refer the sceptical to the Report itself, where ample reasons for the changes are detailed.

The fifteen following propositions relate to a subject of considerable consequence, but in which the Commissioners have met

with great difficulties, namely, the Enfranchisement of Copyholds. The great lawyers who assisted in preparing the 12 Car. 2, appear to have felt the weight of the objections which oppose themselves to an entire abolition of copyhold tenure. The "fruits of tenure" (as they were termed in relation to the lord), which were abolished by the conversion of the holding by knight's service into common socage, had been already so much broken in upon by the institution of uses and trusts, that few subjects had been anxious to retain their feudal seigniory, and the Crown itself, which was the principal loser, gained perhaps more than an equivalent in the valuable fixed revenue provided by the same statute; for though the Speaker of the House of Commons, in the language of that day, informed the king, "that what he had before in his Court of Wards, he would be sure to find hereafter in the Exchequer of his people's hearts," it does not appear that his Majesty was willing to rest satisfied with such security. The same reasons which recommend the abolition of the tenures of Borough English and Gavelkind, apply, though not altogether with equal force, to that of Copyhold. The latter certainly possesses one advantage, and that of no inconsiderable extent, which does not distinguish the former, namely, an extreme simplicity of title by means of the entries on the court rolls, which a general Register would, however, render unnecessary. Still it has its own peculiar disadvantages, some of which—such as an exemption from extent for debt, the necessity of a license from the lord to lease, the confusion of boundaries with those of adjacent freeholds, the conflicting rights of the lord and tenant to timber and minerals, which the tenant cannot use and the lord cannot remove —may be remedied by special enactments; but others—such as the vast variety of local customs, particularly as regards fines payable on admittance, and the obstacles to improvement, occasioned by proportioning the fine to the improved value—can scarcely be got rid of by any measure short of the abolition of the tenure. Such abolition cannot, however, be effected without an equitable adjustment of the valuable rights possessed by landlord and tenant; and the difficulty of directing a general compulsory enfranchisement arises, first, from the expense of ascertaining the value of those rights, and, secondly, from the complication of the interests which co-exist both in the manor and copyholds, and the consequent necessity of preventing any fraud being practised upon those who have an estate in remainder or reversion, vested or contingent. The Commissioners having expressed their opinion in favour of the conversion of the tenure into common socage, nevertheless, decide, that these obstacles to compulsory enfranchisement are insurmountable; and their propositions under this head are accordingly confined to facilitating and encouraging such

a change of tenure, by enabling the freehold tenant of a manor, whether in possession, or reversion expectant on a lease for years, (but in the latter case with the consent of the lessee), to effect, and the copyhold tenant for life to accept, the enfranchisement, so as to bind in each case the remainder-man or reversioner. The second difficulty is then met by directing that the consideration shall be a yearly rent charged on the enfranchised property, or else a surrender of part of the property to the lord, or else a sum of money to be raised by mortgage of the copyhold; and the rent may at any time be extinguished by payment of money to be raised by such a mortgage: but any gross sum of money, where the lord is entitled only to a limited interest in the manor, is to be paid to two trustees, to be approved of by two barristers of seven years' standing; and is to be applied by them in redemption of the land-tax or the discharge of incumbrances on the settled estates, or in the purchase of other estates to be settled to the same uses, and in the meantime is to be invested in the funds or on a mortgage of the enfranchised property; which property is of course to be liable to the uses previously affecting it. It is proposed also to extend these powers of enfranchisement to Ecclesiastical corporations, the consent, however, of the chapter, or patron and ordinary, being required in the cases of bishops, deans, prebendaries, parsons or vicars; and they are to be extended also to trustees, &c. As a further check upon copyholds, escheated and waste lands are not to be regranted for the future by copy; and under the next head the Commissioners endeavour to mitigate many of the evils attending the tenure.

Now we confess that we are more disposed to differ from the Commissioners in respect of their proposals as to enfranchisement than on any other matter comprised in their Report; and we think that, although a *general* compulsory enfranchisement may be unadvisable, on the ground of the expense occasioned by an adjustment of the terms where the copyhold is of small extent, (which is the only objection raised by the Report,) yet a middle course may be adopted, by which the enfranchisement will only be compulsory where the property is sufficient to meet the expense. Such a course has been, as we think, pointed out by the late Mr. Humphreys, whose work, although bearing in many respects the appearance of haste, has yet been of essential public service, inasmuch as it has contributed more than any other publication, except the present Lord Chancellor's speech on the improvement of the law, to excite a feeling of public interest upon the very dry though important subject of legal reformation. Mr. Humphreys proposes to empower the Court of Chancery, on the petition of the lord of any manor and one-fourth in value of the copyholders, or of four-fifths in value of the copyholders without

the lord, (the parties being entitled to an estate in possession), to issue a commission for the purpose of effecting the enfranchisement of all the copyholds of the manor, and extinguishing the several onerous incidents of the tenure.* Now, without stopping to inquire into the details of this plan, we think a principle is suggested which may be rendered very effective, and will considerably diminish the expense that would otherwise fall on individual copyholders. The valuation of timber and minerals, and some other rights, must still be made separately as to each tenement; but a general compensation may be settled for fines, heriots, and other servitudes, and an assessment made to cover the amount, which may be charged on the whole of the enfranchised lands with a right of contribution as between the tenants, or apportioned upon each separately; or a certain portion of land may be allotted to the lord, first from the waste, if there be any, and then from the several copyhold tenements; which being enfranchised together, the several smaller allotments may be taken from contiguous portions of different tenements, making a compact whole. It might perhaps be feasible to extend this plan at once to all manors where there are copyholds above a certain value, by permitting in such case even one large copyholder to petition, and upon proof of the value directing a commission. In the meantime the facilities proposed by the Commissioners may be afforded concurrently with the above scheme. We cannot enter into the details of either system, but think that the trustees, who by the propositions are to receive any gross sum of money paid upon enfranchisement, should be the trustees of the will or settlement which created the estate of the party in possession; or if there be none, then trustees appointed, one by the party in possession, and the other by the party entitled to the first vested estate of inheritance, unless under legal disability. In the few remaining cases not so provided for, the machinery of the two barristers may perhaps be introduced.

By the eighteen following propositions, the copyhold tenure is proposed to be improved, and upon the principle of these we think there will be no difference of opinion. It is proposed to remedy the inconvenience of a confusion of boundaries (which has become a serious evil in Norfolk, Suffolk, and Essex), by directing the lord, at the expense of any tenant requiring it, to cause a survey and map to be made, distinguishing the freehold from the copyhold lands of the tenant, which is to be approved of by the homage (as we presume, to guard against fraud, since lords, having partial interests, are to conclude those in remainder), and

* Observations on the Actual State of the English Laws of Real Property, Part II., Chap. III. Second Edit.

when approved, to be entered on the court rolls. We doubt whether some further precaution against fraud be not requisite, to prevent the lord, as tenant for life, in effect selling a part of the demesne lands. We also hesitate as to the propriety of saddling the copyholder with the whole costs of the proceeding; but the general principle of the arrangement is unexceptionable. The most important of the remaining propositions are the enabling copyhold tenants to lease for twenty-one years, at a rack rent without license; and the subjecting copyholds to debts and specialties in the same manner as freeholds.

By one proposition, under the head of Customary Freeholds, it is intended to extend all the propositions with regard to copyholds, so far as they are applicable, to other customary tenures.

It should be observed, that with regard to wills devising copyhold and customary estates, the Commissioners have offered several remarks in their Report; but they decline reducing them to distinct propositions, since the entire subject of Wills is to occupy a distinct volume. The appendix to this Report contains a very able communication from Sir James Graham, on the evils incident to customs regulating the devise of certain customary estates in the North of England.

We now arrive at the second division of the Propositions, namely, those classed under the head of Contingent Remainders, Future Estates, and Perpetuities.

The whole doctrine of contingent remainders depends upon the strict rules of the common law, of the rigour of which however, in the opinion of the Commissioners, they form the first relaxation; and it is not improbable, that they were contrived, as suggested by the Report, to meet the exigencies of family settlements.* An estate to be determined on condition would, as we have before observed, naturally tend to the creation of remainders, especially as it would scarcely bend to the purposes of a settlement, for the grantor alone and his heirs could enter for the condition broken. The contingent remainder appears to have been permitted from a very early period, although it is difficult, as the Commissioners have remarked, to reconcile it with the effect of a feoffment and livery of seisin, which was supposed to transfer the whole interest of the feoffor. Thus, upon a feoffment and livery by A. to B. for life, with remainder to the first son of C. (who has at the time no child) in fee, if the whole interest pass from A., it is impossible to say *to whom* it passes; and accordingly the bosom of the law, or the clouds, were supposed by some to be the limbo of such expectant interests; whilst

* For a masterly sketch of the history of alienation, see Mr. Butler's note on Co. Lit. 191 a, VI. 3.

others held the estate to be in abeyance, *i. e.* nowhere; though by means of a compromise between common sense and common law, Mr. Fearne tells us, that it appears to have been held that a *quasi* interest remainded in the grantor, giving him a right of re-entry on the determination of the particular estate before the happening of the contingency. The similarity of every contingency to a condition is obvious, and it is remarkable, that the same difficulty as to the effect of a feoffment and livery was experienced, in some conditional feoffments, as in the case of a contingent remainder.* We should not have dwelt on this subject, if it did not afford so remarkable an illustration of the manner in which the law is gradually stretched to accommodate the necessities of mankind, and when it can bear no further stretching, is evaded by the contrivance of a subsidiary system. The feudal theory seems to have almost embodied the metaphysical entity of an *estate* as separated from the physical object of conveyance. For as there always existed under that system a lord and tenant, the former of whom at first enjoyed the reversion when life estates only were granted, and afterwards the *dominium directum*, when the tenant possessed the *dominium utile* of the whole fee simple, and since there were important military services depending upon this feudal connection of lord and tenant, it became a legal impossibility that any land should be held where this relation did not exist; and in like manner the idea of a reversion in fee simple became inseparably connected with that of an estate of any less duration. But we have seen that, as the origin of these notions gradually became obscured, the growing necessities of society introduced contingent remainders, which, however, were found ineffectual, because they required the existence of a preceding estate of freehold, upon the continuance of which, till the arrival of the contingency, they entirely depended, and, consequently, amongst other accidents, the owner of the preceding freehold, though a mere tenant for life, might at once destroy all the contingent interests. It was therefore at length found necessary to have recourse to the clandestine practice of uses, depending at first on the good faith of the parties entrusted with the legal estate, but afterwards enforced by the Chancellor's subpœna. By these means and subsequently (after the statute) by the substitution of trusts for uses, contingent interests were protected merely by the insertion of a few additional words in a conveyance; and there can be no doubt that when necessity has got the better of strict law, the proper course for the legislator is to sweep away the scaffolding which has served its purpose, as far as he can do so without injury to the foundation of

* See the cases put in ss. 349, 350, of Littleton's Tenures, Coke's Commentaries, 216 b, and Mr. Butler's note there.

the work. We cordially agree therefore in the six first propositions of the Commissioners, which protect contingent remainders without the intervention of a trustee for that purpose, and place them upon the same footing as springing or shifting uses and executory devises, whilst they also authorise the creation, without the limitation of a use, of such freeholds *in futuro* as may be now created through the medium of the statute, or by executory devise. Thus will many pages of the learning of contingent remainders be consigned to oblivion.

The seventh Proposition permits the conveyance of such contingent interests and future rights as cannot now pass *at law*, though there may be a transfer of the *equitable* interest. The Commissioners, however, think it right to except the case of a remainder limited to the heirs of a living person. It is doubtful, perhaps, whether or not such an interest would be assignable by a presumptive heir in equity, for it may be distinguished from the case before Lord Eldon (Carleton v. Leighton, 3 Mer. 667), which decides that the mere expectancy of an heir, living the ancestor in possession, is unassignable. That rule is recognized by the civil law (Dig. l. xiv. tit. 6, cap. 1), and has been followed by the Code Napoleon (tit. 6, c. 3, 1600); but such a determination appears to rest on public policy, and where (as in the present case) the ancestor takes no interest in the property, the objection to an assignment of the expectancy appears to be materially diminished.

The twenty remaining propositions relate to perpetuities, a branch of the law upon which the Commissioners have, in their Report, bestowed considerable attention, and we regret that our limits will not permit us to do justice to their labours. When, by the gradual relaxation of the framework of the laws relating to the transmission of property, the real exigencies of mankind have been provided for, there arrives, as we have observed, a period at which the possessors of property will be desirous of gratifying the capricious imaginations, generated by an indulgence extended to mere necessities. For individuals, forgetful of the principle which has enabled them to extend their power over property, namely, concurrent recognition by the judicial and legislative authorities of the *general* expediency of the proposed encroachments, will seek to exercise their own individual fancies in advancing the legal border, however inadvantageous or disadvantageous such fancies may be to the community. In this manner the pride and vanity of owners have led them, at all times, to attempt extending their present dominion to future ages. The *fidei-commissaria substitutio* of the Roman law was extended *ad infinitum* till checked by Justinian. In France the same grievance existed till put an end to by the Chancellor de l'Hôspital in the reign of Charles IX., for to him is attributed the *Ordonnance d'Orléans* of 1560.

Bernardi, an author by no means favourable to any revolutionary principles, thus describes that ordonnance, and the grounds upon which it was founded. "On réduisit à deux degrés (l'institution non comprise) les substitutions qu'on pouvoit auparavant étendre jusqu'à l'infini. Ce genre de substitution, que nous avons vu rénouveler de nos jours sous le nom de majorats, avait ressuscité les inconveniens et les embarras de la feodalité. Il donnoit aux grandes familles plus de consistance et de force, que ne l'exigeoit le répos de l'état. On desiroit depuis long tems qu'on reduisit les degrés dans lesquels il séroit permis de substituer; l'ordonnance remplit ce vœu."* We see that in the above passage the author refers to the inconveniences of the feudal system, namely, the unbarrable entails which formerly subsisted in most parts of Europe, and which to this day exist in Scotland. But we do not think that those early entails arose so much from the vanity of the owner as from the necessity of providing for the defence of the state by securing a reversion to the donor in failure of male heirs; thus the statute *de donis*, which first settled entails on a permanent footing, in its first clause recites the donor's being barred of his reversion by the conditional donee, and not the defeating of the right of the donee's issue, as the principal grievance requiring a restraint to be laid upon alienation. Although, therefore, the effect of the old entail and modern perpetuity may be equally prejudicial to the general interests of society, yet their primary causes appear to be very different, as might be expected from the different stages of society at which they originate. Be this as it may, the Courts of law, acting in accordance with public opinion, gradually broke through the barrier of entails in this country, and it was not until after the statute of uses that any attempt was made at the creation of a perpetuity. For their history from that period, we must refer the reader to the very luminous and interesting argument of Mr. Hargrave on the Thellusson Will, which is published in the third volume of his *Jurisconsult Exercitations*. It is sufficiently known that the limits now fixed, during which real property may be unalienable or subtracted from general commerce, are any number of lives in being at the time of the execution of a deed, or at the death of a testator, and a period of twenty-one years afterwards. It is unfortunate, that in the early cases, as in Goring v. Bickerstaffe (see Mr. Hargrave's argument above referred to), the number of lives should have been treated as a matter of indifference; and Sir Mathew Hale is there said to have made use of the often-repeated expression, that "all the candles were burning at once," though it be clear, that by means of numerous lives, the vesting of an estate may be postponed for

* De l'Origine et des Progrès de la Legislation Française, Liv. viii. c. 2.

nearly a century, including the twenty-one years. It is obvious that the first cases only contemplated lives connected with the property, and necessarily limited in number, and that the twenty-one years were fixed upon by analogy to the disability of the infancy of a party interested; but in a late well-known case, referred to by the Commissioners, it was held that twenty-eight lives unconnected with the property, and a gross term of twenty-one years, did not exceed the limits of the law. Some limit should be placed to these painful extravagancies, and the legislature have already interfered to prevent the accumulation of rents and profits or interest of money for more than twenty-one years from the death of the testator. The Commissioners propose that lives shall not be *arbitrarily* taken, (we must refer our readers to the Report for the meaning attached by them to that term), and it must appear by the instrument that they are not so taken. It might at first sight seem more simple to fix on a number of lives, or to determine that they should be those of persons interested in the estate; but we think the Commissioners have pointed out insuperable difficulties in the way of either arrangement.

The remaining propositions under the present head provide for the support, to the extent allowed by law, of limitations now held void because they *may* lead to a perpetuity; and certainly the contrary doctrine appears to have occasioned great hardship, more particularly when we consider that *powers* are very frequently so penned as to exceed the rules against perpetuity. The justice of a relaxation of this rule has been felt and acted upon in the case of the Thellusson statute against accumulation, and we see no reason why the same indulgence should not be extended to all cases.

We cannot pursue any further the details into which the Commissioners have, with much patient labour, followed up this somewhat intricate branch of the law of real property; but both the Report and the Propositions are well worthy of examination, and if little be done, as regards an alteration of the law of perpetuities, yet the subject has been well sifted and prepared for any future reformer. Whether or not, the present limitation, independently of unusual caprice, requires to be more materially curtailed, whether or not any special distinction should be made (as in other countries) with regard to estates in the possession of peers, or other titled individuals—are questions which will suggest themselves; but they are of too great importance to be discussed in the brief space that remains to us.

The last general head under which any distinct propositions have been drawn up by the Commissioners is that of Covenants, and here we must again regret that our limits will not admit of more than a very general statement of the proposed alterations in

the present law. They treat of covenants in their Report as distinguished into those between landlord and tenant, and those where that relation does not exist, and consider both species under the several points of view of the burden imposed on one party, and the benefit conferred on the other. With regard to the question of the manner in which covenants are for the future to be treated by the conveyancing draughtsman, whether any and which are to be implied, or whether any general form can be devised, we understand that all details of conveyancing will form the subject of a separate Report.

At an early period covenants appear to have been divided into those that are merely personal between the parties, and those which may be beneficial or burdensome to the owner of land in respect of his ownership. Those of the latter description are technically said to run with the land; and, in order that they may do so, it is in Spencer's case* (cited by the Report) laid down—1. That if the word *assigns* be not expressed, the assignee will only be burdened or benefited by covenants relating directly to the land, or to any thing in existence, parcel of the demise. 2. That if the thing be not in existence, but may exist, and will then be annexed to the land, the *assigns* (if named) are within the covenant. These rules appear to have been extended from cases between landlord and tenant to every description of covenant connected with land, whether properly or not there may be some question, as there exists a continued privity of estate between the lessor and lessee, and their respective representatives, which can be predicated only in a different sense of the privity that arises simply from the title being derived from A. to B., where B. takes a conveyance of the fee simple. The older books use the phrase privity of estate, in the more restricted sense, namely, of two or more parties enjoying either successive interests in land, and one deriving title from the other, or else having joint simultaneous interests under the same title; the donor and donee of an estate tail and lessor and lessee are instances of the first kind, and joint tenants and coparceners are instances of the second. The term appears to have been first applied more generally in the case of a conveyance by trustees of the trust estate; for a party taking with notice of the trust is sometimes said to be liable in respect of the privity of estate, *i. e.* on account of his deriving title through the trustee; but it is clear that the only real privity in such a case is personal as arising from notice. On the whole, it is very doubtful if the principles laid down in Spencer's case were intended to be stretched to the extent to which they were carried in the well known case of Roach *v.* Wadham,† where it seems

* 5 Co. 17. † 6 East, 289.

to have been held, that a party taking under the exercise by B. of a power of appointment contained in a conveyance from A. would not be entitled to the covenants entered into by A. with B., as not being an assign, or privy in estate of B.

The first five propositions abolish the nice distinctions of Spencer's case as between landlord and tenant with regard to covenants running or not running with the land, by attributing that quality to all covenants by either party where the contrary is not expressed, but very properly limiting the burden on the part of the reversioner to the extent of the value of the reversion.

The sixth proposition is intended to obviate the injustice produced by the technical rule, that if there be a lease from A. to B., and B. underlet to C., and then buy the fee simple of A., he has no remedy for his rent against C.; the actual reversion, which he reserved in that lease, being merged in the fee. The case *has* occurred,* and that is sufficient to warrant precaution against so monstrous an absurdity occurring a second time.

The seventh and eighth propositions relate to that which also appears at first sight an equal absurdity, namely, that a covenant by a lessee not to assign, without licence of his landlord, is wholly released by a single permission on the part of the latter. The Commissioners recommend the abolition of this rule, except in cases of bankruptcy, where the assignees are to be allowed to sell, and then the covenant is to revive. But we question if a door would not thus be readily opened to perpetuities, for long terms of years may be invented, which the termors will not be able to alien without the consent of the creator of the term, his heirs or assigns. We think, therefore, that it would be advisable to restrict the proposition of the Commissioners to twenty-one year leases at a rack-rent.

The remaining propositions relate to covenants where the relation of landlord and tenant does not exist; and they are divided by the Commissioners, first, into those where the covenant is on the part of the person disposing of the land; secondly, those where they are on the part of the party in possession; and thirdly, those relating to title deeds. The *burden* of the former must of course be purely personal, except as far as they may charge other land which the vendor retains, and which, therefore, may be reduced to the second head. With regard to the *benefit* of covenants entered into by the disposer of land with the purchaser, the Commissioners propose by the ninth proposition, that the benefit of all such as relate in any way to the land shall run with it, *i. e.* that every successive proprietor shall have the benefit of them,

* Webb *v.* Russell, 3 T.R. 393, and Stokes *v.* Russell, ibid, 678. Affirmed in Exchr. Chamber, 1 H. Black. 562.

whether there be privity of estate or not, so long as he takes by the act of any party previously entitled to such benefit. The covenants entered into *by* the purchasers or owners of land lead to a question of considerable difficulty. If they be for the payment of a rent, or the like, the usual remedies by distress and entry seem sufficient, and it is scarcely necessary that they should run with the land as covenants; but if they be of a nature by no means unfrequent, namely, that the owner shall not permit such and such dealings with part of the property, as, for instances, that he shall not permit part of a square to be built upon, or a view of the sea to be obstructed, then it becomes matter of grave consideration whether an interdict should be placed at the will of any individual upon any specified employment of property for ages to come. It is quite obvious that these covenants, in many instances, could never be released. Take, for instance, a square: the owner of the ground sells a portion of the land, and exacts such a covenant as above mentioned from the purchaser. He then sells 50 or 100 other pieces; every purchaser is entitled to the benefit of the covenant, and with the probability of infancy or other disabilities, not to mention the different tempers of individuals, a release of the covenant would be impossible. In this manner burdens and servitudes may be created as grievous as those which occasioned the abolition of military tenures. The Commissioners recommend that no covenants of the owner shall run with the land, but that the parties shall be left to such remedies as a court of equity may be disposed to concede, where the particular circumstances of a case usually meet with more consideration than in a trial at law. Whether or no such covenants do now run with the land is a doubtful point, for the discussion of which we refer to the Report. It is certain, however, that in long building leases similar covenants, as to not carrying on particular trades on the premises, are constantly introduced, which, by their former propositions, the Commissioners will leave on the present footing; but with regard to these, there is not the same difficulty of procuring a release, there being usually no partial alienation of the reversion in fee. The remaining propositions relate to the title deeds of property, which it is recommended should be held by every possessor in trust for all persons interested in the estate, to be produced whenever required, even though the holder be a mortgagee. If there be a general register, we see no objection to the latter regulation; but as long as a deposit of title deeds is adopted as a common security for the payment of money, we think it requires great consideration whether that security should thus by a side-wind be materially shaken. Until the establishment of a registry also, we doubt whether it will be palatable to owners of a large pro-

perty, that the proprietor of a public-house, for instance, originally held by the same title, shall be entitled to compel the production of the title to the whole estate. When a register, the grand *desideratum* of our law of real property, has been fairly carried into effect, we have no doubt that titles will be so simplified as not to dread the light.

We have thus examined *seriatim* the several propositions contained in the Report; besides which, as we have said, the Commissioners have recommended a statute of limitations with regard to the recovery of ecclesiastical property. The limit proposed is a combined period of sixty years, and two incumbencies, with three years of a third. One cannot see any very rational ground of objection to this step, which is positively demanded by common justice. There can be no possible comparison as to the side on which the evil preponderates, when it is asked, whether a proprietor, whose predecessors ever since the reign of Edward the Second (see Report, page 61,) have made fixed payments in lieu of tithe, shall now be compelled to pay eight or ten times the amount; or whether the clergyman, whose predecessors have never, during the same period, received more than the smaller sum, shall continue to receive the same amount?—or again, is it bearable, that, under the exchange acts, the clergyman should be able, from some flaw in the exchange, to recover the glebe after sixty years, whilst he may retain the land given in exchange, because the representatives of the laymen are barred by the statute of limitations? The Pope himself may be prescribed against after 100 years; surely our clergy will not continue to demand an unlimited period, a right, be it observed, long since given up by the crown. We are sorry, however, to say that the majority of the answers of the Bishops to the questions of the Commissioners in the appendix give little hope of any seasonable concession, on their part, except in the case of advowsons. It should be mentioned, nevertheless, that the Bishop of Carlisle states it to be his opinion that such limitations as are recommended by the Commissioners are in every point of view desirable.

We have now concluded a necessarily rapid survey of the volume before us, and have endeavoured, we hope not altogether unsuccessfully, to point out the difficulties with which the Commissioners have been encompassed in the execution of this portion of their task. The actual improvements proposed to be effected are certainly few in number, and, as compared with the question of registration, undoubtedly sink into comparative insignificance. Many vexatious customs, however, which perplex and entrap the purchaser, will, if the recommendations of the Commissioners be adopted, be abolished; facilities will be afforded for the reduction of all lands to an uniform tenure, and, in the

mean time many of the inconveniencies attached to the copyhold tenure will be alleviated; the mystic lore of contingent remainders will be either elucidated or rendered useless; the free alienation of property will be promoted by curtailing the capricious exercise of a controul not sanctioned by general utility, and many obscurities will be dispelled, and absurdities exploded, that now affect the doctrine relating to those engagements which men daily enter into by covenant. Whether any or all of these advantages might not be pushed farther will deserve the consideration of future reformers; but there is one circumstance we have not touched upon, namely, the situation in which the Commissioners stand as charged with a legal, and not a political reformation. Strong political feelings may be excited not only by the discussion of the limitation of ecclesiastical rights, but also by the recommendations with respect to perpetuities and copyholds, and having pointed out existing defects, the Commissioners have perhaps acted prudently in abstaining from proposing any sweeping alterations, which lie more in the province of the statesman than of the lawyer.

We cannot close our remarks without referring to a valuable passage in Hale's tract, before alluded to, on the amendment of the laws, with regard to the manner in which bills for that purpose should be carried through parliament. After proposing that they should be prepared by the judges and other lawyers, and should originate in the Commons, he recommends that after the second reading the judges should be called in, and directed to state their reasons for proceeding so far as they have done by the bill and no further; "for," says he, "it very often falls out that a very good and profitable bill is suddenly spoiled by a word inserted, or a word expunged, which would be prevented if the contrivers of the bill were first heard to it." How far the bills of the Commissioners may escape the fate here pointed out will be a matter perhaps of chance; for without the slightest disparagement of the abilities of the Solicitor General, we may suggest, that the subject referred to the Commissioners is one in which common lawyers are usually the least conversant, and assuredly he cannot be expected alone to master the details of every bill to be preferred by the commission. Indeed the observation of Hale strikes at the root of a crying grievance as regards every act of parliament public and private, for the heterogeneous clauses amassed in one act baffle research on any given point, whilst the slovenly manner in which they are frequently penned, would ruin a young conveyancer if allowed to disgrace his practice.* Well was it observed of parlia-

* The evil is of old date—witness the title of the 22 Geo. 2, c. 46, An act to continue several laws for preventing exactions of the occupiers of locks and wears

ment by the late Lord Chief Justice, that it is "magnas inter opes inops." When the bill is in committee clause after clause is brought in without the slightest regard to the general frame and scope of the whole, and it is unaccountable that some scheme should not have yet been established for even a technical revision of the bill before the third reading.

With these suggestions we quit the present subject, earnestly hoping that the Commissioners will proceed as they have begun. There are many branches of the law of real property, as it appears to us, besides those of wills and conveyancing in general, (reports on which are promised), that admit of very considerable improvement, without trenching on any fundamental principles. As being immediately in connexion with our concluding remarks, we would first suggest a consolidation of the statute law relating to real property, following the example set by that of the penal statutes. Independently of the more obvious advantages of such a step, great benefit is derived from the exposure at one view of the defects of the system. Thus, when it can be seen at a glance that Peel's acts, as they are called, assign the punishment of death to seventeen different offences, though confined to offences against *property*, and amongst these not comprehending forgery nor coining, a far greater number of people are made to reflect upon, and the proof is much easier of the sanguinary nature of our code, than when the axe and halter lay concealed under the thick covering of the one hundred and fifty repealed statutes. Such consolidation, however, is but a comparatively light task. A more delicate, and not less important operation will be, the review of the equitable doctrines that affect real property, and interfere with the legal title. Many of these, we think, might be adopted as part of the common law; several should be pared down to a more strict coincidence with it, whilst others perhaps should be entirely exploded. Another very important subject is the liability of real property to debts. The present Report proposes to subject copyhold estates to their payment; we hope for a recommendation from the Commissioners, that all real estates should be liable to the payment of debts by simple contract, and we expect that the whole law of real assets will by their efforts be placed on a

upon the river Thames westward, and for ascertaining the rates of water carriage upon the said river; and for continuing, explaining, and amending the several laws for the better regulation of attornies and solicitors; and for regulating the price and assize of bread; and for preventing the spreading of the distemper amongst the horned cattle; and also for making further regulations with respect to attornies and solicitors; and for further preventing the spreading of the distemper among horned cattle; and for the more frequent return of writs in the Counties Palatine of Chester and Lancaster; and for ascertaining the method of levying writs of execution against the inhabitants of hundreds; and for allowing quakers to make affirmation in cases where an oath is, or shall be, required.

more satisfactory footing. A variety of topics of minor interest will suggest themselves under the above heads, which we will not now pause to enumerate; there is at least some chance of a fair consideration of every branch of legal reform in a parliament which more nearly approaches to an accurate representation of the wants of the great mass of the community, than any national assembly that has yet met in Europe. Such a parliament will, it may be hoped, in every department, sanction by their authority the principles laid down by Bacon:

"Finis et scopus quem leges intueri, atque ad quem jussiones et sanctiones suas dirigere debent, non alius est quam ut cives feliciter degant.—Lex bona censeri possit, quæ sit intimatione certa, præcepto justa, executione commoda, cum formâ politiæ congrua, et generans virtutem in subditis."—*De Aug. Sci.* lib. viii.*

Art. VI.—HOUSES OF REFUGE FOR JUVENILE OFFENDERS IN THE UNITED STATES AND IN FRANCE.

The increase in the number of juvenile offenders, and the insufficient means provided for their proper treatment, have, at length, attracted general attention, and in various parts of the country representations have been made by the magistrates and the grand juries, of the great necessity of some change in the laws with regard to this very extensive class of offenders.

In vain do the chairmen of the quarter sessions pronounce their sentences of "three months' imprisonment, and to be twice privately whipped"—and in vain do they add to it, "and the last month in solitary confinement." The number of the young offenders increases upon them, in spite of stripes and solitary cells. It is most important, under these circumstances, to look around us, and see in what manner these beardless criminals are treated in other countries, and what success has attended those modes of treatment.

A remarkable work† just published at Paris, by the two commissioners dispatched from France to examine, on the spot, the

* We have not noticed the able article on Registration in the appendix to the Report, (nearly the last effort of that most distinguished jurist Jeremy Bentham in the cause of legal reform,) since it refers exclusively to the subject treated in our last number.

† Du Système Pénitentiaire aux Etats-Unis, et de son Application en France, suivi d'une appendice sur les Colonies Penales et de notes statistiques. Par M. M. G. de Beaumont, et A. de Torqueville, Avocats à la Cour Royale de Paris, Membres de la Société Historique de Pennsylvanie. Paris, 8vo. 1833. See also the last Report of the New York House of Refuge, *Jurist*, vol. iii. p. 462.

American establishments for the reformation of criminals, contains an invaluable account of what has been already accomplished in the United States with regard to the improvement of juvenile delinquents; and few institutions could be found more unexceptionably proper for adoption in England, than the American system of managing their *houses of refuge.* To the extracts which we purpose to give from this work, we shall add, in the following pages, some interesting opinions, derived from an authentic source, upon the existing state of such establishments in Normandy, together with a short note of the information given to the House of Commons last year, concerning similar establishments in England, by Mrs. Fry and other witnesses, to the committee which has since made a report on secondary punishments.

The few distinctions between our own law and that of the United States, with regard to the inmates of houses of refuge, will be readily collected from the French account. But the Codes of Napoleon contain provisions upon the subject which it will be proper to notice specially.

The civil code thus regulates the power of parents over children.

Art. 375. A father who has great cause of complaint of his child, may take the following method of correction.

376. If the child be under sixteen years of age, the father may have him, or her, confined for a term not exceeding a month. For this purpose the president of the Arrondissement Court shall issue a warrant of commitment upon the father's application.

377. From sixteen years of age to majority, or to emancipation, the father may claim the confinement of his son, or daughter, for six months at the utmost. For this purpose he must apply to the same judge, who is to confer upon the case with the Procureur du Roi; and, at his discretion, grant a warrant of commitment for the whole six months, or for a shorter term, or refuse it altogether.

378. In no case shall written forms be required, except in making out the warrant, which however is not to express the motives of the commitment. But the father must sign an agreement to pay the expenses and provide food for the child.

379. The father may release the child whenever he pleases; and have him recommitted as at first.

380. A father who has married a second wife must conform, in all cases, to the 377th article.

381. If the mother has married a second husband, she can only have the children of the first marriage confined upon the joint application of two of their father's nearest relations.

382. When the child has property, or is a trader, there can be no commitment except by the rules of the 377th article; and in these cases an appeal lies to the *cour royale.*

383. Natural children, legally acknowledged, are subject to the rules expressed in articles 376, 7, 8, and 9.

The Penal Code directs:

Art. 66. That "when the accused is not sixteen years old he is to be acquitted, if it be decided that he acted without discernment. But in that case he is, according to circumstances, either to be placed with the parents, or in a house of correction, to be there taken care of during the term, which in no case is to extend beyond the criminal's twentieth year. If it be decided that the accused acted with discernment, the punishment is to be as follows:—In cases subject generally to death, to hard labour for life, or to transportation, he is to be condemned to imprisonment in a house of correction for a term not less than ten, nor longer than twenty years; in cases subject generally to hard labour for a limited number of years, or to solitary confinement, he is to be condemned to imprisonment in a house of correction for one-third at least, or one-half at most, of the time for which he would have been condemned to those punishments; in all these cases, he may be placed, according to the judgment, at large, under the surveillance of the police, for five years at least, and ten years at most. If the young criminal has incurred the punishment of the pillory, or of banishment, he is to be condemned to imprisonment in a house of correction for a term not less than one year, nor exceeding five years. In none of these cases is he to be exposed publicly. If his offence be such only as subjects him to correctional punishment, he may be punished at discretion, but so as not to suffer a punishment exceeding the half of that to which he would have been liable if he had attained sixteen years of age."

Having thus stated the French law on this subject, we shall proceed to give the important details collected by the Commissioners with regard to the establishments in the United States for the correction of young delinquents.

"In 1825, (say the French Commissioners,) there was established a kind of penitentiary, which is not the least important of the new designs which we are to describe. We mean the House of Refuge for Young Delinquents. The anticipations of its founders have been amply borne out by experience. It is a known fact that most of the young delinquents of every country were the victims of hard fortune before they became criminals. An orphan without means of support, and without friends, or a youth abandoned by parents, seldom escapes the allurements of vice. Struck with the extent of the evil, some benevolent individuals in New York devised the plan of a House of Refuge, at once

an asylum against want, and a means of instruction. The first subscription amounted to 30,000 dollars; and private activity alone produced an establishment superior to a penitentiary, inasmuch as its purpose is to prevent crime, whilst penitentiaries are destined to punish and correct it."—p. 191.

The third part of the volume is devoted to the consideration of the subject of Houses of Refuge in the following terms:—

"Governor Clinton, whose name will never cease to be honoured in the state of New York, said—'houses of refuge are the very best penitentiaries which the sagacity of man has devised or his benevolence established.'"

The first house of refuge was established in New York in 1825; one followed in Boston in 1826; another in Philadelphia in 1828; and all things seem to promise that Baltimore will soon follow the example.

"Some individuals in New York, moved by the unhappy fate of the young delinquents who were mixed up in the prisons with hardened criminals, conceived the idea of applying a remedy to the evil; they united their efforts, laboured in the beginning to enlighten the public opinion, and then setting an example of generosity, they contributed the means for the establishment of houses of refuge, which were soon supported by a multitude of subscriptions."

The houses of refuge, though originally created by the charity of individuals, have, nevertheless, received the sanction of the legislature, every individual is detained there legally; but though the law sanctions the houses of refuge, it does not in any way interfere with the direction of them, which is left entirely to the founders. The state appropriates every year sums of money in aid of their support; it, nevertheless, takes no part in their administration. The authority for managing the houses of refuge is vested in the whole body of the subscribers, who have either contributed towards the creation of the buildings, or towards the expense of their annual support. The subscribers assemble and appoint managers, upon whom they confer the power of regulating the establishment at their discretion. These managers choose the officers, and make all the necessary regulations for the institution. Amongst them there exists a permanent managing committee, upon whom devolves the charge of carrying their resolutions into effect: this is the executive power of the institution. The officers of the house of refuge are the immediate agents of the managing committee, to whom they submit an account of all their acts. They give no account to the government, which requires none from them.

Amongst all the officers the consideration of the managers is directed chiefly to the choice of the superintendent, upon whom

the welfare of the institution depends. Thus, left to themselves, and under the controul of public opinion alone, the houses of refuge prosper; those exertions by the aid of which they are supported are so much the more powerful, as they are free and spontaneous.

"Though the expenses of the buildings and support of them are not paid out of the taxes, they are not, in fact, the less burdensome to society at large; but these expenses are paid by those who are able to afford it, and who feel a moral return in the consciousness of their pecuniary and personal exertions.

"The houses of refuge are composed of two classes of inmates: they receive not only young people of both sexes, under twenty, convicted of crimes or misdemeanors, but those also who, without having undergone condemnation or judgment, are sent by way of precaution.

"None dispute the necessity of houses of refuge for young people who have been convicted. In all times and in all countries, the inconvenience of shutting up young delinquents and hardened criminals together in the same place, and under the same regulations, has been acknowledged: the prisoner of tender age has generally committed only a slight offence; the evil of his associating in prison with the man who has great crimes to answer for, is self-evident. The vice of this system is of so serious a nature, that magistrates hesitate to commit the young delinquents, and jurors to condemn them. But there is another danger. Encouraged by impunity they abandon themselves to fresh crimes, which a punishment proportioned to their offence might probably have prevented.

"The object of a house of refuge, the regulations of which are neither too rigorous for a child nor too light for an offender, is to shield the young delinquent from too severe punishment, and at the same time from the danger of impunity.

"The individuals not under sentence who are sent to the refuge, are young boys and girls who, without having committed any crime, are so circumstanced as to threaten the peace of society and to endanger their own happiness: orphans whom poverty has led to a life of wandering or mendicity; children abandoned by their parents and leading a disorderly life; in short, all those who, whether through their own fault, or through misfortune only, have fallen into a state so nearly bordering on crime, that they would infallibly become criminal if they were left free.*

"It was considered proper then that houses of refuge should admit young criminals, together with those who were on the point of becoming such; to the latter the infamy of a conviction is spared, and all are saved from the stain of a prison. In order that no idea of shame should be attached to the being in a house of refuge, a name is given to

* "We ascertained on visiting a house of refuge in New York, that more than half of the children admitted there up to that time, came to it in consequence of misfortunes which did not spring from themselves. Thus, out of 530 children, 135 had lost their father, 40 their mother, 67 were orphans, 51 had been led to crime by flagrant misconduct or want of care on the part of their parents; and there were 47 whose mothers had married again.

the establishment associated only with the idea of misfortune. The house of refuge, though containing a certain number of criminals, is not consequently a prison. He who is detained there does not undergo a punishment; and in general, the order under which children are sent to the refuge, has neither the solemnity nor the forms of a judgment. And here we must take notice of a fact which appears to characterise the institution. The magistrates who send the children to the refuge, never fix the length of time the young delinquent is to pass there; they only direct his being placed in the house, which from that time has all the rights of a guardian over him. This right of guardianship expires when the child attains the age of 21; but before even he has attained that age, the managers of the establishment may take him out if his interest requires it.

"The house of refuge holds a middle place between a college and a prison: young delinquents are received there much less with the view of punishing them than in order to give them that education which their parents or their ill fortune has withheld from them; the magistrates, therefore, cannot fix the term of their remaining in the Refuge, because they cannot foresee what extent of time will be sufficient to reform the children, or to correct their vicious propensities.* This care falls to the managers of the establishment, who, seeing the children daily, can judge of their improvement, and point out those who may be set at liberty without risk: even then, when a child is released for good conduct, he does not cease to be under the eye and care of the managers until he has attained his twentieth year; and if his conduct does not answer to the expectations formed of him, they have the right to recall him to the House of Refuge, and, moreover, the power, in order to force him to return, of taking the severest measures.

"Some objections have been raised in Pensylvania to the legal power given to the houses of refuge of shutting up individuals who have committed no crime nor undergone any sentence: such a degree of power it has been said, is contrary to the constitution of the United States; besides that, the power given to the managers of the establishment, of shortening or prolonging at their will the length of the detention, was of too arbitrary a nature to be tolerated in a free community. Theoretically it would be difficult to answer these objections: it was nevertheless well known that the houses of refuge mitigated the misfortunes of young criminals instead of aggravating them, and that those young people not under sentence confined in them, were so far from being the victims of persecution, that they were only deprived of that liberty which would prove fatal to them.

* "The different authorities who have the power of sending children to houses of refuge are:

"1st. The courts of criminal justice.

"2dly. The police officers.

"3dly. The governors of the almshouses.

"The revised statute of New York, pt. 4, tit. 7, c. 1, s. 17, is as follows:—'Instead of condemning a convict felon under sixteen years of age to the central prison, the Court may order his detention in the House of Refuge established in New York by the Society founded to reform young delinquents, unless the Court receives notice from the said Society that the House of Refuge has no vacancy.'"

"But these objections have disappeared. Not a voice is now raised against the houses of refuge. We can conceive, nevertheless, with what caution those whose office it is to send children to these establishments ought to use their power, when we reflect that they have the right of separating the child from the father and mother, and that they are called upon to exert this authority in cases where the parents alone have to reproach themselves with the disorderly conduct of their child. The law has foreseen the possibility of abuse, and has endeavoured to supply a remedy: the child has the right of appeal, according to the law, against the decision of the magistrate who sends him to the Refuge. The parents have the same power; and examples are not wanting of this right being exercised.

"On the other hand, it is not persecution and tyranny that are to be dreaded in these establishments. As it is desirable that there should not be the same severity in the House of Refuge as in a prison, so it would be attended with danger to permit the indulgence and the merely mental pursuits of a school. But certainly if these establishments in America deviate from the true object of their institution, it is less in leaning towards too much severity, than in being inclined to too great leniency.

"The fundamental principles upon which the houses of refuge are established are simple. At New York and at Philadelphia the children are separated during the night in solitary cells; in the day they are allowed to communicate. Separation at night seems absolutely required to preserve good morals, but it is not necessary during the daytime: absolute solitude would be dreadful to children, and silence could only be maintained by chastisements too horrible to think of. Besides, the depriving them of all social intercourse would be very mischievous, for without it children would make no progress whatever.

"At Boston they are not separated either night or day, and we were not told that communication at night was attended with inconvenience; but the danger of it is not the less great in our eyes, and is only averted at Boston by a zeal and vigilance so extraordinary, that it would be vain to expect it always from those even the most devoted to their duties.

"The time of the children is divided between schooling and labour: they are taught all elementary knowledge which will be useful to them in after life, and also some trade which will afford them the means of existence. Their mental exercises give to the establishment the appearance of a seminary, and their labour at different trades is on the same plan as in a prison. These are the two principal features which characterise the House of Refuge.

"Their instruction is not limited to the mechanical arts and the development of the mind; an effort is made to form the heart, and to inculcate in them principles of religion. Mr. Hart, superintendent of the House of Refuge at New York, often told us, that without the aid of religion his exertions would be almost vain.

"When the young delinquent enters the Refuge, the superintendent informs him of the rules of the establishment, and gives him for his guidance these two remarkably simple rules: 1st. Never tell lies. 2dly. Do your best. The superintendent then enters the name of the new comer in the great register of the *conduct book*. This register contains

every information respecting the children. It states, as nearly as possible, their former life, their conduct during their stay in the house, and their future conduct. The child is then placed in the class most suitable to him, according to his age, and character as far as known. Mr. Hart, of New York, distinguishes the first class as formed of children who do not swear, who do not lie, and also who are as attentive in the school as in the work-shop. According to Mr. Well's plan, at Boston, this same class is composed of those who strive regularly and constantly to behave well.

"At Boston the admission of the child into the Refuge is accompanied with circumstances worthy of being recorded. The establishment forms a small society, which may be compared to the great society of the world. In order to be received under its roof, the individual must not only be acquainted with its laws, and submit to them freely, but he must be accepted as member of the society by the whole community. Consequently this reception must be preceded by a term of trial, after which the candidate is admitted or rejected, according to the majority of votes.

"In each house of refuge the individuals are divided into good and bad classes. Good or bad conduct decides the being admitted into the one or the other. The good classes enjoy privileges which are refused to the bad, and the latter are obliged to submit to privations from which the former are exempt. Eight hours at least are devoted every day to mechanical labour, by which the young people learn different trades, such as that of joiner, shoemaker, tailor and carpenter, &c. Four hours are given to the school. A prayer begins and closes every day. Three meals occupy each a half-hour. In fine, their day consists of about fifteen hours, and there are nine for rest.

"Such are the regulations established, with little variation, in the two houses of refuge of New York and Philadelphia. They only vary according to the change of season, which influences the hour of rising and going to bed. At Boston much more attention is paid to the moral part of education than in either of the others. Here only five hours and a half are devoted to mechanical labour; and, besides four hours passed in the school, more than an hour is given to religious instruction; and the children have every day two hours and a quarter of recreation. These leisure hours are not those which prove the least useful to the young people. Mr. Wells, the superintendent, joins in all their games, and whilst the physical strength is developed by corporal exercise, the moral character is formed under the influence of a superior man, who, though present to their view, in reality does not enact the master amongst them, and whose authority is never greater than at the moment when he does not suffer it to be felt.

"In the school the children are taught reading, writing and arithmetic; some knowledge too is given them of history and geography. The method most in use amongst them is that of Lancaster's system of mutual instruction. The children in general show a great aptitude in seizing the ideas presented to them by their teachers. It has been often remarked in America, that the children belonging to the houses of refuge are of a more intelligent class than any other; and the nature of these establishments explains this fact: in general they are composed of children aban-

doned by their family, or who have run away from the paternal roof, and for this reason have early been accustomed to depend on their own resources, being reduced to look to themselves only for the means of existence. That they learn quickly then is not surprising. The greater number have, moreover, a restless, adventurous spirit, eager to learn. The same disposition which impelled them early to their ruin, becomes afterwards a powerful cause of success in the school. They are never refused any useful book which they desire for the purpose of improvement. In the library of the establishment at Philadelphia there are more than fifteen hundred volumes, all for the use of the children.

"Hours of labour are fixed for all, and none can evade them. Nevertheless a task is set, which, being finished, the youth more active than the others may go to his recreation. There is a never-failing watchfulness over the children even in their play hours. They may amuse themselves together as much as they please, but anything like gambling is strictly forbidden. Health is considered in all respects.

"They are required to wash their hands and feet every day. Their clothing is always cleanly, and their food, though simple, is sufficient and wholesome. No one is allowed to eat of anything but that which the rules of the establishment admit, and water only is drunk. There is no canteen from which the children can obtain any additional meat or drink, and the utmost care is taken that none is procured for them from without.

"The board and clothing of the young prisoners are provided by the managers. The childrens' work is contracted for, and the restrictions are of such a nature that the contractor can have no kind of influence in the establishment.

"At New York and at Philadelphia they permit the contractor to employ the children eight hours a day: five and a half only are allowed at Boston. The contractor, or those employed by him, come to the House of Refuge, and teach the different trades required. Beyond this they are not allowed to hold any conversation with the young people, nor keep them in the work-shop one minute beyond the appointed time. We can conceive that on such terms the engagement with the contractor is not very advantageous in a pecuniary point of view; the children are not taught to work to make a profit of it, the object is to give them habits of industry, and to teach them an useful trade.

"Nothing is found in the United States similar to our proceedings. In the prison of the Madelonettes, destined for young culprits, in Paris, all discipline is laid aside by the contractor. He considers each child as his private property; and if the slightest effort is made to instruct the young prisoners, the contractor does not allow it. He says, 'I am robbed of those hours which belong to me.' He sees nothing but his own personal interest; the interest of the children seems in no way to concern him. He therefore thinks only of making as much money as possible from their work. As a trade takes some time to learn, he rarely gives himself the trouble to teach it to the children; he prefers employing them in such manual labour as requires neither skill nor address. This labour, gainful to him, is of no sort of use to the children, who, on quitting the house, are expert in no particular trade."

We cannot, then, be surprised, that to support a house of refuge is found more expensive than other penitentiary establishments. On the one hand, the young prisoners are better fed and better clothed than those convicted of crimes, and also more expense is incurred for their education; and, on the other hand, their labour does not produce so much as that of those who are committed to prison for a length of time. We should soon see, too, that the young culprit quits the establishment as soon as he can be advantageously placed elsewhere. He is set at liberty as soon as he knows his trade, that is, as soon as ever his labour begins to be productive to the establishment.

The houses of refuge in the United States are managed by the governors, and are not in the hands of contractors; it is thought, with reason, that the system of contract, applied to all the branches of administration, would be inconsistent with necessary moral discipline.

"Although, upon the whole, the maintenance of the young culprits is expensive, every thing seems combined to avoid, as much as possible, great cost. The houses contain boys and girls, who, though under the same roof, are quite separate. But this proximity admits of employment of the girls in work for the boys, which otherwise must be paid for. They wash the linen, mend the clothes, and make the greater part of the clothing worn by the boys or by themselves; they cook for the whole house; in this way, the expenses of the establishment are not only diminished, but the young girls are occupied usefully, whom it would be difficult to employ profitably in any other manner."

This order of things is established and maintained by a mode of discipline which we shall now examine. Two means of influence are employed: rewards and punishments. But in the application of this principle, we must make a distinction between the houses of refuge of New York and Philadelphia, and that at Boston. In the two first establishments, the punishments inflicted on the disobedient children, are—

1st. Loss of recreation.

2d. Solitary confinement.

3d. The food being reduced to bread and water.

4th. And in cases of great offence, corporal punishments, that is, flogging.

At New York the rules expressly authorize flogging. At Philadelphia, not daring to permit it expressly, it is not forbidden. The distribution of punishments belongs to the superintendent, who has a discretionary power in the establishment.

"Whilst the young culprits, who have offended, undergo these different punishments, according to the extent of their fault, rewards for merit are conferred upon those children who have behaved well. Be-

sides the distinction of belonging to the first classes, those who have been particularly diligent and well-behaved, wear a badge of honour, which distinguishes them from the rest; the superintendent, in fact, chooses a certain number of the best and appoints them monitors, and to them he confides a part of the duties which would fall upon himself; and those upon whom this mark of confidence is conferred attach the greatest importance to the obtaining of it.

"At Boston corporal punishments are forbidden in the House of Refuge; moral discipline is all that is used there, which is based upon the most philosophical principles. The intention is to raise the minds of the young people, and to make them anxious to obtain their own esteem as well as that of those about them; to arrive at which, they endeavour to treat them as if they were men, and members of a free society.

"In looking at this as a means of good discipline, it appears to us that inspiring a child with a high opinion of his moral capability and his social condition, is not only the way to reform him, but also to render him more compliant.

"It is a rigorous principle in the House of Refuge to inflict no punishment except for breach of the laws of religion, of the municipal law, or of the regulations of the establishment. The following principle, extracted from the books, is rigorously respected. 'Inasmuch as it exceeds the power of man to punish disrespect to God, those who act improperly in matters of religion are only to be forbidden all participation in religious offices.' This expulsion is held to be the severest punishment. Telling tales of each other is strictly prohibited; a rule that might be usefully received in France, where it is encouraged and practised by the most valuable prisoners. If a fault is acknowledged, the offender is forgiven. At Boston, also, a conduct-book is kept, in which the good and bad marks are entered by the children themselves. Every night each gives an account of himself for the day; and the entry is made upon this account; which is usually more severe than the reckoning of a bystander would be; and it is often necessary to moderate it. In difficult cases, and where breaches of discipline are committed, the difficulty is settled by twelve jurors chosen from the rest of the boys. Wherever a magistrate or a monitor is to be elected, the election falls upon him who has most votes of the whole body. These elections, and the duties of the juries, are most serious matters to these citizens of ten years old.

"These minute details will not be thought useless, and it will not be supposed that we attribute much importance to the portion of the system which makes these children politicians. But the plan is original, and being consistent with the institutions of the United States, produces more effect than might be supposed. Whether it creates a respect for the law in after life or not, there is no doubt that in the House of Refuge it is of use in checking vice. It is, indeed, not difficult to see, that it is calculated to give an elevation of mind to the boys.

"But other means of reform are not neglected. The well behaved enjoy great privileges. They alone are the electors and the qualified

candidates. Those who are in the first class have two votes, of which the rest cannot be jealous, because all may acquire the same right by good conduct. The good boys keep the keys; they go out when they please; and without asking leave they can visit any part of the house. Their words are taken on all occasions; and their birth-days are kept. These various privileges are distributed amongst the class of good boys, some having one of them, and some another.

"The punishments inflicted upon the class of bad children are, the loss of the right of voting; of being elected; of the privilege of going into the superintendents' apartments; of speaking to him without leave; and of conversing with the other children. They are sometimes also punished by being made to carry burdens; by having the eyes bandaged; or by solitary confinement."

Such is the system established in the Boston House of Refuge.

"That practised in New York and Philadelphia is less peculiar; but perhaps preferable. The Boston House of Refuge is, indeed, the most successful; but that is less owing to its peculiar system than to the very remarkable man who conducts it. The placing the children all together at night is the great fault of the Boston house; its general plan depends, too, upon a lofty principle, which is not easily comprehended by common men; and it might fail if the superintendent did not possess vast resources of mind. But in New York and Philadelphia the theory is simple: separation at night, classification by day, labour, and instruction may be insured without trouble in such establishments. The plan is capable of being contrived and continued without great talents.

"It is not to be desired that success should ever depend upon the superintendents; who ought, however, to be chosen with the greatest caution. The individuals at the head of the houses of refuge at Boston and New York, Mr. Wells and Mr. Hart, may be taken as models for such functionaries. Steady zeal and unwearied vigilance are the least of the good qualities of these officers. They are at once intelligent, mild, and firm. They are sincerely religious; and thoroughly convinced of the efficacy of the system confided to their care. Remarkably tender in their own dispositions, they influence the conduct of the children more by touching their hearts, than by appealing to their understandings. They look upon these children as their own; and discharge a duty delightful to themselves rather than a task which they have undertaken.

"It has been stated how young culprits are admitted into the houses of refuge, and how treated there. It remains to consider the principles which regulate their discharge, and how they turn out afterwards.

"The principle, that the detention is not for punishment, is never lost sight of. Being sent in for their own advantage, the inmates are discharged whenever their discharge is likely to be for their good, When they have learned a trade—when they are so much improved in habits and disposition as to be likely to behave well, they go; but not forlorn and unattended by the protecting care of the house. The superintendent looks out for proper masters or families, to receive them as apprentices or domestics. They are never abandoned alone to evil asso-

ciates in the towns; and the country is generally preferred for their future lives. At leaving the House of Refuge, they receive a letter of advice, expressed in affectionate language, and a Bible. It is seldom found advantageous to release them before the end of a year's detention; and afterwards they are subject to the superintendence of the managers. If they run away from their masters, they are liable to be recommitted for new terms of discipline as often as is necessary—for boys, until they are twenty years of age; and for girls, until they are eighteen years of age. Whilst they are in service, the superintendent keeps up a constant communication with them by letters or otherwise; of the advantages of which intercourse striking examples have occurred.

"Such is the system of America, which in theory seems perfect. It is the young criminal in whom reform is most reasonably to be expected. Honest feelings are far from being extinct in them; the dispositions to be good only require to be roused. This system therefore seems to be exactly suited to their case, by finding for the deserted a protection, for the ignorant a teacher, for the vagrant, the disorderly, and the neglected, a course of religious instruction and industrious occupation. It could scarcely fail to introduce good habits in the place of vicious propensities. There are however failures. The young girls who have been prostitutes are almost irreclaimable; and those boys are the most difficult to be reformed who have fallen into habits of drunkenness and theft, although they are less fatally lost than the prostitutes. It is generally thought in the United States that the mild discipline of houses of refuge is best adapted to boys admitted under sixteen years of age, and to girls under fourteen years of age. If left in bad practices after these periods, a severer discipline seems necessary for their correction.

"In Philadelphia more than half the subjects have left the houses of refuge reformed, according to the testimony of the superintendent.

"In New York we examined the results ourselves. We took the cases in the register book one by one, and ascertained what had become of the boys, to the number of 427, who had been discharged; 85 had behaved well, and 41 admirably; the accounts as to 34 were unfavourable; as to 24 very unfavourable; as to 37 doubtful or contradictory; as to 24 rather good than bad; and as to 14 rather bad than good. Out of 86 girls discharged, 37 had behaved well, 11 admirably; the accounts as to 22 were unfavourable; as to 16 very unfavourable; as to 10 doubtful; as to 3 rather good than bad; and as to 3 others rather bad than good. So that out of 513 children received into the House of Refuge in the state of New York, more than 200 were saved from inevitable ruin, and have been restored to a reputable position in society."

In their second chapter the Commissioners thus proceed to remark upon the state of juvenile delinquents in France.

"If France would adopt some of the chief rules of the American houses of refuge, the principal evils of her prisons would be corrected.

"By the law of France, culprits under sixteen years of age must not be confounded with older criminals; and the former are to be confined in places which are designated houses of correction. Generally, however, young culprits and old criminals are at present mixed together in our

prisons. There is another important rule in the French law. One under sixteen years of age, who has been accused, and is acquitted upon the declaration of being without discretion, is either to be placed in the hands of his relations, or sent to a house of correction to be brought up in confinement for any number of years fixed by the judges, not exceeding the age of twenty. This alternative signifies clearly enough the object of the legislature. If the relations appear to be capable of correcting the child's evil propensities, they are to have the future charge of him: if those propensities appear to have been stimulated by bad example at home, so as to risk future contamination, the house of correction is to be open to him, more as a seminary than as a prison. But it is to be regretted that the asylums which have hitherto been prepared utterly disappoint the law: they are rather nurseries for crime than houses of correction; consequently the judges are averse to execute this law, and prefer the great risk of encouraging crime by absolute impunity, to the destruction of individuals who ought to be confined for their improvement. A third provision of the French law is rendered useless in consequence of the wretchedly defective state of the prisons; namely, the power given to parents to send minors who behave ill to a place of confinement, but who now cannot think of resorting to the law.

"The discipline therefore of the French gaols, in reference to young culprits, requires extensive amendment; which may be accomplished by imitating the American houses of refuge. It might indeed be difficult to adopt their plan entirely. The power of the police magistrate to put suspected young delinquents into confinement, and that of taking others from parents who are unable to bring them up properly, might prove incompatible with our manners, as much as with our laws. But the way of managing houses of refuge in America will be highly useful in France, in reference to young convicts, as well as in reference to those who, being under sixteen years of age, are declared to have acted without discretion, but who are still unfit to be set at large. Once reform the French houses of correction, the wretched state of which now deters the courts from sending young culprits thither, and numbers of such criminals, of vagabonds and of common beggars, would be sentenced to their walls, who now roam about the streets until bad habits and bad company lead them to the commission of serious crimes. A reform to this extent might be made by building solitary night cells, and by introducing, by day, labour and instruction alternately, as practised in New York and Philadelphia.

"With this change, however, there must also be made another considerable alteration in the French system, if success is to be expected. The success of the Americans is in a great measure owing to the discretional powers given to the managers as to the detention or release of the children. They are very much guided in their determination as to this point by opportunities offering for their disposal. They are constantly looking out for such opportunities; and being entrusted with proper authority, do not lose them by delay. By the French law the director of a house of correction could not do this; he must wait until the time appointed by the judgment is expired; and the result is that, however

well disposed the young prisoner may have become, he is generally thrown back by the impossibility of honest employment.

"This evil may be removed by a slight amendment of the 66th article of the penal code, which distributes the accused under 16 years of age into two classes; first, those who, having acted with discernment, are condemned; and, secondly, those who, having acted without discernment, are acquitted, but who are detained for their own good. The first class ought to suffer the judgment pronounced by the courts. Their personal interest is of little consequence. They are not shut up in order to their own improvement only. The interests of society demand that they should be punished by way of example. The second class are otherwise circumstanced. They are secluded only in order to be improved by the public, when their homes would corrupt them. They are held to be only unfortunate, and society undertakes to do that for them, in a house of correction, which adverse fortune has refused. They ought not therefore to be detained for a specified term of years. Whether they should be confined at all or not, ought to be still left to the courts to adjudge, according to the circumstances proved at the trial. But it seems unreasonable to require from the courts, at that period of the trial, to settle the length of time during which the confinement shall last, when their progress in improvement can alone furnish means of deciding that difficulty. It would be better to invest the inspectors and directors jointly with this duty. More attention would, in that case, be paid to their dispositions, and the proper moment for their release would be more successfully chosen, both in reference to their personal character and the opportunities that might occur for placing them as apprentices, or otherwise. This change of the law is of the first necessity; it leads at present to great evils, the existence of which will excite little surprise when it is considered that the power conferred by this law has no legitimate restraint. It is *impossible*, before experience of the effects of discipline on the mind and heart, to judge how long the child should be confined, who is sent for improvement only, and not condemned for an offence. The execution of this part of the law is therefore arbitrary: and it is even often matter of accident whether the confinement ordered is till the fifteenth or till the twentieth year of age. Accordingly, cases of the most shocking absurdity occur under this law. The first point to be settled in the trial of an accused, under 16 years of age, is, whether he acted with discernment or not. Suppose in the case of A. B. the result to be in the affirmative, and he is found guilty, the *sentence* will be proportioned to the offence, and extend probably to a *few months* only for punishment. But suppose in the case of C. D. the finding to be in the negative, and he is declared not guilty, the *order* will be to send him to the same house of correction for *several years*, for education. It may be said truly in cases like these to be better to be found guilty than to be acquitted. The law, not the judges, are in fault; and it is only necessary to amend the laws, so as to enable the managers at their discretion to release the young culprits who are confined, but not condemned.

"This change would make houses of correction really houses of refuge, calculated to produce effects upon the minds of the young inmates by no means impossible to be obtained. Without doubt, many other points

subordinate to this must be considered in order to make the reform complete. A principal one is, how to excite an interest in the public mind upon this subject. Another is, what class of inmates ought to be in the proposed houses. Another is, to settle their plan of management. Another is their locality. Another their number. These, and other points which we have not entered upon, require the careful examination of enlightened men well acquainted with the laws of France, with the habits of the people; and with the present state of the prisons.

"If the American system be attempted to be introduced into France, such circumstances must be removed as are impediments to its success. A grand difficulty is, how to distinguish the houses of refuge at once from schools, and from prisons. In America, they approach too nearly the character of schools, which may destroy their peculiar utility, since children, instigated by idle parents, may seek in them needlessly, what should be provided at home. Some of the severities, therefore, of prisons must be kept up in houses of refuge. They must not be managed with so much indulgence as to become the occasion of envy to the absolutely innocent. It ought not to be forgotten that the abuse of philanthropical institutions is as mischievous to society as the evils which they are to cure."

How much the reforms discussed in this Report are needed in France, may be inferred from the following statement, made by two zealous friends to reform in the management of prisons in Rouen in Normandy, where perhaps as much pains have been taken upon this subject, as can be expected from individuals unsupported by the government of that country, until an extensive reform is introduced into its provincial administration.

"It has long been cause of vain regret," said Dr. Vingtrinier, of Rouen, in 1826, "that many young persons, without experience and utterly ignorant, should be exposed to the pernicious example of the older prisoners of the worst character. The bad language, the bad advice, and the gross habits of hoary offenders could only complete the ruin of these unfortunates. If they entered the prison walls unhabituated to crime, they were sure to come out versed in the deepest depravity. The improvement hitherto made is imperfect; but it at least effects the great purpose of checking the career of iniquity heretofore absolutely encouraged. But it cannot be doubted, that the effect of the reform which is begun will be still more extensive."

Such was the statement of Dr. Vingtrinier, in 1826. In 1828 he repeated the statement in an appeal in the newspapers, addressed to the public in behalf of further exertions in favour of young criminals. In 1830 the following appeal was published at Rouen, by M. Barbet, for the same purpose.

"The French penal code," says M. Barbet,* "has carefully provided for the young; even anticipating the cases in which they may have acted

* Essai sur la Régénération Morale des Prisonniers, par M. Auguste Barbet, lu à la Société libre d'Emulation de Rouen, le 1er Mars, 1831, à Rouen, 1831.

with, or without discernment. Those who are almost too young to be able to speak, come under this law, and may be taken to a house of correction until of age. The object of such detention is that the children may be improved by it; if, however, their prison be nothing better than a school of vice, this object manifestly fails. This is so clear that when the penitentiary system was about to be established in France, M. de Larochefoucault-Liancourt induced the government to begin with a trial of it in the persons of the young. By his interposition the ordonnance of the 9th of November, 1814, was issued, directing, that 'all under twenty years of age convicted of crimes, taken indiscriminately from the prisons of Paris, and from those of the adjoining departments, should be assembled in one prison, to be appointed for them by the minister of the interior.'"

Nothing could be more just or more wise, than to direct the attention in the first place to the young, that portion of the inmates of prisons who have the longest time to live, and against whose crimes society needs the most protection. But how was this well-conceived ordinance executed? Alas, precisely in that way in which all good undertakings are executed in France. At first hailed with enthusiasm, it was soon put aside as Utopian, an epithet which, to the superficial, is the signal for proscription. It gradually fell into neglect, and swelled the list of philanthropic plans which the ministers keep as illustrations of the fickleness of the people.

"The firm, however, are never daunted by discouragement. New entreaties were addressed to the government in order to secure its attention to the young prisoners, although these entreaties were met by the old replies of want of money, and defects in the proposed plans. Something, however, was gained by perseverance; in most of our prisons the young were separated from the rest. But *they still continued mixed together themselves;* and the only discipline attempted, scarcely went beyond an appearance of good order. The most abandoned were still left to demoralize, by their evil habits, the numerous little culprits whom moderate care might reclaim.

"One example, that of the Bicêtre at Rouen, which was under my official superintendence, may be referred to with advantage on this head; and facts connected with it will afford the most satisfactory support to my arguments.

"Our penal code limits the age of infancy, in regard to punishable crimes, to sixteen years. So that, although the civil code disqualifies all who have not attained twenty-one years of age from disposing of the least particle of property, capability of crime is attributed to the same individuals, if they are a day older than sixteen. No consideration is had to weakness of mind, to want of education, to bad example. If the fact designated as a crime or a misdemeanour be once proved against a youth of sixteen and a day old he is imprisoned, or even executed. The case is not imaginary. It is not long since youths of seventeen were executed amongst us; and at Lyons a boy, actually not fifteen and a half old, was once put to death for high treason.

"This inconsiderate distinction is particularly injurious to the young *before trial;* if they happen to be upwards of sixteen years of age. After conviction, such as are not more than sixteen undergo their punishment in a part of the prison allotted to them especially; and so are placed at this important period of their lives in a pandemonium somewhat less infected than other culprits. But such as are a little older, however slight the cause of detention, are shut up without distinction with offenders of the gravest description—with men often condemned and again caught—with those who are accused of forgery, of assassination, and of arson. It is impossible to doubt what must be the effect of whole months of contamination of this kind. When condemned they are also exposed to unchecked association with veterans in crime, who have studied the penal code with sufficient success to know when to stop, in order to be liable only to punishment by the correctional police; and who train these their scholars to commit the crimes which lead them to the higher courts. On the 18th of February, 1831, there were in the court of the Bicêtre at Rouen (that is to say, mixed with the common herd of prisoners for trial), twenty-four from fifteen and a half to nineteen years of age, whose offences were theft, vagrancy, and begging, and who were liable to imprisonment for three months to one year. The youngest of them had been already once convicted.

"A separate part of the Bicêtre is appropriated to the convicts who were under sixteen when committed; but the bad arrangement of this prison renders the separation imperfect. When the visiting commission was established, these boys slept two and two in the same cells, a distribution obviously calculated to produce the worst effects. It was accordingly prohibited as far as the accommodation allowed. The youngest were, however, unavoidably left together, to the great dissatisfaction of the commission, who were extremely anxious to have a separate cell for each boy. The necessity of this will be apparent when it is considered, that of ten, between nine and a half and seventeen and a half years of age, one had been twice convicted of theft;—that of twenty-nine between eleven and nineteen years of age, three had been twice convicted, one thrice, and one five times; that thirteen, between thirteen and nineteen years of age, were confined before trial for theft, vagrancy, and begging, along with convicts. To finish this picture it remains to be added, that at the time of the inquiry the prison contained eleven girls, between ten and sixteen years of age, condemned to imprisonment, of whom several had been taken up in houses of ill fame; and one, only thirteen years old, afflicted with the venereal disease.

"During the day, these children are unquestionably not left to themselves; but they are not duly separated from each other's vices. The reading and writing class, for a few hours, under one convict master; the weaving class, under another convict master; and the intended shoemaking class, are really of little more use than to prove the excellent wishes of the governor of the prison, whose means are unfortunately too feeble. The unfortunate children thus reached by the severity of the law, are not corrected as the law should correct its victims.

"Nevertheless the citizens, who thus neglect them, suffer from their crimes upon dismissal from this demoralizing abode; and can

only escape the consequence of the evil by changing the system which creates it. Whilst confined they look upon labour with dread. Their parents have generally accustomed them to idleness, vagrant lives, and to thieving. They have the most urgent need of such kindly teaching as may give birth to honest feelings. Whilst compelled to undergo regular toil, they must be treated justly, and even with gentleness. *Above all, their task must be offered as a relief.** By appropriating out of their labour a little property to their own use, this reward will convince them by experience that from labour and economy alone men obtain happiness; and by permitting some amusement even in prison, we must consult the necessity of their tender age, which requires relaxation.

"Such are my views for the treatment of juvenile prisoners, which I insist upon the more urgently, inasmuch as they are either without homes or relations to guide them, or their homes and relations tend to demoralize rather than to improve them. Prisons, therefore, ought to afford these unfortunate beings a true protection in a wise system of moderation and firmness, profitable industry and good instruction; bringing clearly to their view the means of redeeming past faults, and of recovering that rank in society, from which they have for a time fallen. If moral dangers only await them under their paternal roof, we are bound to give another direction to their grateful and quick feelings. Is there not a Deity to whom they will one day have to account for their actions? and ought not the visitors of the poor amongst us to become their parents in the difficulties by which they are surrounded, in order to prepare such account? The influence of those visitors may display itself most advantageously in what affects the children of the poor, by instilling principles of integrity into their young minds, in a degree calculated to conciliate all men to this new institution."

Dr. Vingtrinier has introduced several judicious observations upon the treatment of young criminals, in a valuable paper upon the reform of penal laws recently read before the Royal Academy at Rouen. This paper exhibits the intelligence of a great provincial town of France in a favourable light; and it is peculiarly pleasing to an English traveller to find the most enlightened opinions of his own and other countries fostered in a spot abounding in recollections familiar to the history of his native land.

"The celebrated Howard," says Dr. Vingtrinier, "observed in regard to those who were surprised at his desire to do good to prisoners, that, if they would but reflect how few of their boasted virtues they could justly call their own, how often crime is really hateful to the man whom it leads to infamy and to death, how extensively mere circumstances influence men's conduct, they would then be more indulgent."—*Howard*, i. p. 25, ed. 1788. The useful innovations lately made in the criminal law of France, and in prison discipline, sufficiently prove that the opinion of

* This is the leading idea of Mr. Livingston's new plan of first imprisoning convicts; and, after some interval, offering them the *relief* of voluntary work.

this great observer of human nature has since his time been well understood. The moral reform of prisoners is now an object of the law, in addition to punishment; nor is it taught to inflict upon any, sufferings beyond those which the interest of society renders necessary. Scarcely twenty-eight years ago, however, when the new system was thought of, many physical evils, equally barbarous and useless, were added to the punishment decreed by the law. Close confinement and chains, torture, prison fevers, the small-pox, scurvy, the itch, carried off many and tormented all. Besides all this, the want of occupation, the dreadful source of many vices, gave them up to immorality, and rendered a return to virtue hopeless. At the present day, to punish is not the sole object of criminal laws. With more foresight, and more humanity, we now not only claim reparation by punishment for the wrong which a criminal has done to society, but we also endeavour to render him a useful member of the community, by teaching him how to labour for his support.

"It however unfortunately happens, that the improvement in the criminal law is not yet sufficiently extensive for attaining this philanthropic object.

"There is no doubt of the concurrent facts of improvement in the management of our prisons; of a relaxation of severity in executing the law; and also of a diminution in the number of our criminals. But criminals would probably be still less numerous if greater improvements were introduced into the laws. Experience in our penitentiary prisons has proved their use in really reforming criminals. M. Dupin has observed this in his work on the resources of France, and I have verified the observations in Normandy. From that experience may be added examples of sincere and lasting penitence, similar to those which are insisted upon by Howard, Larochefoucault-Liancourt, and by De Chateauneuf. Had such reformed individuals been left to the old system of idleness and ignorance, and indiscriminate association with the vicious, they would not have escaped from continued crime. In these cases the true end of the law has been secured. But if prisons ought to be looked upon as places of trial, the time of trial then ought not surely to be unreasonably prolonged. To look forward to many years of confinement must excite despair; and the reward of good conduct is too remote to induce exertion. A sense of honour and justice is more common in the convict than we are apt to believe; and *if* condemned, even for a grave offence, to a disproportionately severe punishment, his spirit revolts against the injustice. A young man of twenty-six years of age, who would readily admit the enormity of his crime if suitably visited, looks upon ten years' imprisonment as utter destruction; and if personal exposure to the public be added to this, he considers return to society impossible, and abandons hope. It is therefore of the first importance to *shorten the term of imprisonment now usual.*

"But the length of time to which judges have a discretion to sentence culprits, is not the only obstacle to their reform. The most serious, is the infamy attendant by the law upon the commission of

crime. This is the more to be regretted when it is considered that the mass of offenders are under twenty-four years of age; a period of life at which the heart cannot be irretrievably hardened. The returns show, that from sixteen to thirty criminals increase; and that they diminish after that period. How sad a sight is it to witness this class especially, exposed to the contamination of confirmed criminals; when they themselves must be still susceptible of good impressions, unless nature be a false parent. Punish them in another way, and they will beyond all question amend. Again, the branding of criminals is calculated to produce none but the worst effects. It destroys the self-respect which all possess more or less, and from which the law ought to derive a guarantee to good conduct, instead of rooting it out of men's hearts.* Of the same character with branding are all infamous punishments. They ought to be abolished without exception, and the way be kept absolutely free for the criminal's return to his place in society. The strength of popular feeling against them is too violent, and all possible means ought to be taken not to aggravate that feeling. If the law will not adopt a more moderate system, and reduce all personal punishments to simple penitentiary imprisonment, we may expect to see jurors repeat the mischievous course of shaping their verdicts† on the more moderate parts of the code, omitting all aggravating circumstances, which expose the accused to its severer enactments.

"It would, indeed, be right to put an end to all personal exposures of criminals in pillories, and to all executions. They clearly do not effect the purposes for which they are employed. The people who attend them, do so from curiosity, and to gratify a desire to witness what is not common. I have also myself frequently noticed, as Howard did, that such exhibitions are rather occasions of debauchery and idleness than of serious reflection and improvement. If, then, it be clear, that corporal and public punishments produce no good effects upon those who witness their infliction, they are not likely to reform the criminals who suffer them. They are calculated, on the other hand, to crush the remaining germs of virtue which a better system would encourage. I have had proofs of the bad consequences produced by disproportionate severity of punishment. 'I have been coward enough,' said a prisoner one day to me, 'to let them drag me to the pillory, when I ought to have died first. Now, therefore, there is no hope left for me to regain respect. My fate is fixed to remain a rascal; and yet,' added he, shedding tears of despair, 'I was not born to infamy.'"

* Branding has been abolished in France lately, and therefore we omit several illustrations stated by Dr. Vingtrinier of its ill effect. The following anecdote, however, is worth preserving. The French legislature of 1791 abolished the punishment of branding; but Napoleon insisted upon its restoration, when the imperial councillors, who were members of the legislature before, unhesitatingly returned to the old barbarism.

At the Cape of Good Hope, and in some other English possessions, branding is not yet abolished.

† The author states cases which have occurred in France, similar to those so frequent in English courts, of evading capital punishments.

It cannot be too often repeated, that the less culprits are exposed to personal humiliations, the more readily will their hearts resume a sound action, and vibrate in harmony with the rest of their kind. Self-respect may be recovered by them, under wise management; and it will especially revive under the new system lately introduced into some of the prisons of France. In that country an experiment is making, at the Madalonnettes in Paris, on a large scale. More than three hundred boys, separated from men, are there subjected, in some degree, to the new principles; and considerable improvements are likely to be made in the management of the house. It has not been established long enough to furnish examples of reform; and the recent information brought by the French commissioner from America, is received in season, to hasten the suppression of some errors into which this extensive undertaking was likely to fall.

The provisional regulations of this establishment, which is called "La Maison des jeunes detenus," are as follows:—

The inmates shall be divided into two great classes. The first is to comprise those committed for trial, those who have appealed from sentences passed, and vagrants; the second class is to comprise all who have been definitively sentenced.

The first class are to have a yard, a kitchen, sleeping rooms, and other necessary apartments, quite distinct from the second class. All of them who are under thirteen years of age are to have separate sleeping cells. They have the same sort of food as the second class, and clothes are provided for those who have none.

The second class are to have one set of rooms for trial. All of them under fourteen years of age have a sleeping room separate from those above fourteen. There is also a portion of the house for those who behave ill, namely, a yard without trees, cells with single beds, and a distinct workshop.

A portion of the house is set apart to receive those who behave particularly well, apartments of honour, which are furnished well, and open into a garden, with walks. These are to be better dressed than the rest; and, after being released, their future conduct is to be watched and reported.

In summer all the inmates rise at five o'clock; in winter at six o'clock. They work till nine; from ten to one; from two to four. Their schooling is from half-past nine to ten o'clock.

At work they may sing, but not make any irregular noise. They are to be punished by the superintendents, not by the contractors. The earnings are to be divided thus:—one-third for the house; one-third for the boys every fourteen days; and one-third for the boys when discharged.

The punishments are to be carefully proportioned to the of-

fences. Besides those usual in schools of mutual instruction, they are also,—1. Confinement in the punishment-rooms; 2. Bread and water; 3. Solitary confinement; 4. Dark cells; 5. Straw to sleep upon; 6. To be deprived of the visits of friends; 7. To be deprived of play hours; 8. To be tied to the foot of the bed, with the hands tied behind the back; 9. Strait waistcoat; 10. Punishment dress; 11. A punishment box; 12. Expulsion and commitment to a prison.

The rewards are,—1. To be removed to the rooms of honour; 2. Dresses of honour; 3. Pecuniary rewards; 4. Annual prizes, publicly distributed; 5. Good marks in the register-book; 6. The King's pardon and liberty.

We shall not lose sight of this deeply interesting subject, which has the strongest claims, not only upon the attention of the legislature, but upon the justice and benevolence of the public at large.

Art. VII.—REPORT ON THE COURTS AT LANCASTER.

Report of the Commissioners appointed to inquire into the Practice of the Court of Common Pleas at Lancaster, and to consider the propriety of removing the Assizes from Lancaster.

Another proof is afforded by this Report of the injudicious and inconsiderate manner in which our legal reforms are conducted. While the question of local courts has been referred to the Common Law Commissioners, a separate Commission is issued to other persons to inquire into the Courts of the County Palatine of Lancaster; courts which are, to all intents, *local* courts, and which ought undoubtedly to have been brought under the consideration of the persons appointed to report upon the general question. That the opinions of both bodies of commissioners will harmonise, can hardly be expected, although Mr. Starkie is a member of both; and the consequences, we suppose, will be, that the County Palatine will continue to form an exception to the rest of the country, not for any intelligible reason, but because, in the words of the Report, "the courts of the County Palatine form an essential part of the princely attributes with which his Majesty is invested as Duke of Lancaster."

We are not aware that there is any thing in the geographical position, the natural productions, the trade and manufactures, or the population of Lancashire, which can render it necessary that a peculiar system of administering justice should prevail there,

differing from that in other parts of the kingdom. It is true that it is a populous and busy county, distinguished by the importance of its manufactures, by its weighty commercial transactions, and by the general activity and industry of its inhabitants. It is true also that one means of promoting its prosperity is to afford justice and redress as cheaply and expeditiously as possible; but it is not true that every other part of the country has not the same claim to cheap and expeditious justice. If, however, we understand the following passage from the Report, the Commissioners are of opinion that the system of administering law, pursued in Lancashire, is in some manner peculiarly appropriate to that county, and furnishes no argument for the establishment of a similar system elsewhere.

"Under these circumstances, we have come to the conclusion that the jurisdiction of this court ought to be continued. We are well aware of the great advantages which result from the simplicity of the judicial establishment in England, which, by confining to a limited number of judges, resident in the metropolis, discussions upon questions of law, whilst the same judges on their several circuits preside over the trials of fact before juries in their respective counties, tends at once to produce order and regularity in process, impartiality in the trial of issues, and, above all, those most important objects in the administration of justice, uniformity of decision and certainty in the rules respecting life, liberty and property; and we are fully sensible, on the other hand, that the numerous disadvantages attending local tribunals in a country that ought to be governed by an uniform law, make them unfit for questions of difficulty or of importance in point of value. These considerations would have led us to a different conclusion from that which we have announced, if we had found that the courts of the county palatine were either unsatisfactory to any portion of the inhabitants of the county, that their practice was essentially different from, or more expensive or more imperfect than that of the courts at Westminster, that the use made of them did not justify the expense of a separate establishment of officers, or finally, that they exhibited any such defects as required the interference of the legislature to re-model them in any new form. But after an attentive consideration, we own that we think that the long existence of any institution, and the undisputed attachment of the people to it, are very cogent reasons for preserving it, even though it may not be possessed of that perfection which it is possible to imagine in theory, or even to attain in practice. The habit of appointing two of the judges of the superior courts at Westminster to be the common law judges of the County Palatine, and the certainty that the same rule of law and the same impartiality were observed in County Palatine causes as in others, combined with a superior degree of economy in the procedure, have served not merely to prevent any of that discontent which existed with regard to local tribunals in other parts of the kingdom, but to render the administration of justice in the courts of the County Palatine highly satisfactory to the large and important class of his majesty's subjects within their jurisdiction."

The reasons above alleged by the Commissioners for the continuance of the County Palatine Jurisdiction, will fail to convey to others the conviction which they have themselves derived from them. "The long existence of any institution" is, in itself, no reason whatever for preserving it; since both good and bad institutions have a long existence. The long existence of Paganism, the long existence of the Catholic faith in this country, are sorry reasons against Christianity and a reformed religion. Change is undoubtedly attended with a degree of evil, but the question is, or ought to be, whether that evil is not more than counterbalanced by the effect of the change. If, without reference to that question, the point is to be decided by our veneration for "long existence," all human improvement is at an end. Nor does the "undisputed attachment" of the Lancashire people to their courts appear to us a very cogent reason. Men are often as much attached to things evil as to things good; and if this argument had been acted upon in the case of the Welsh Judicature, the Judges of England would never have obtained a footing within the principality.

We are the more surprised that the Commissioners should have adopted this style of argument; because they have much better reasons with which to enforce their views. Simplicity, expedition, and economy—all which they attribute to the proceedings of the Palatinate Courts—are much more convincing arguments, in our minds, than an antiquity transcending the conquest, or a strength of attachment which would prompt the Mayor of Lancaster to die in defence of his Court of Common Pleas.

The Commissioners, therefore, recommend the continuance of the Palatine Courts, and enforce their recommendation by the following comparison between Lancashire and the Metropolis:—

"By the last returns which have been made to Parliament, it appears that the County of Lancaster, already the seat of many of the most considerable towns in the empire, and abounding in all the natural facilities that give birth and vigour to manufactures and commerce, is rapidly advancing in wealth and population to an equality with London and Middlesex. Those who have witnessed its progress, and are aware of the energy and enterprise which animate it, cannot doubt that, under the continued blessing of laws which give hope to industry and security to property, it must speedily surpass, in both particulars, the Metropolitan City and County. The superiority in wealth and population, which necessarily creates more frequent demands for legal process and investigation, seems justly to claim for that part of the empire which possesses these advantages the establishment of officers connected with Courts of Justice; and if this claim may fairly be admitted at present to the County of Middlesex, we apprehend it cannot with justice be denied to the County of Lancaster, that it should retain those institutions which, in this particular, place it, as it is already placed by its wealth and population, nearly on a footing

with the Metropolis. It may also be urged that, considering the nature of that wealth, and of those transactions which prevail in the County Palatine, being chiefly commercial, facility and dispatch in the adjustment of legal controversies are quite as essential to its prosperity as to that of the Metropolis itself."—pp. 6, 7.

It might be supposed, that "facility and dispatch, in the adjustment of legal controversies," are essential to the prosperity of other counties besides Middlesex and Lancashire; and if these are to be secured by the judicial institutions of the County Palatine, why is the rest of England to be denied the benefit of them?

The Commissioners enter at some length into the practice of the Court of Common Pleas at Lancaster, and point out various changes in it which they think desirable. Those changes consist, for the most part, of an assimilation to the practice of the superior courts at Westminster, together with certain other improvements. The following suggestions with regard to the forms of serviceable process are excellent:

"We propose, therefore, that in cases of serviceable process, a writ, of summons should be substituted for the present writ of *Capias*; that such writ should be issued under the seal of the court, requiring the party summoned to enter an appearance at the office of the prothonotary, situate in Preston, within eight days after the service of the notice.

"We recommend that the writ should also shortly state the cause of action, as that it is for debt on judgment, or bond, or for breach of contract, for use and occupation, for work and labour, or for damage to the person, or lands, or goods of the plaintiff, as the case may be. We think that this would be preferable to a mere statement of the form of action, inasmuch as a description of the cause of complaint would usually convey more effectual and substantial information to the defendant of the claim intended to be made than would be communicated by a technical statement of the form of action, as that it was in debt, trespass, or trespass on the case. But as the object of giving such information, in the first instance, is to enable the party served with process, at the earliest opportunity to make satisfaction or pay money into court, it would be proper to provide that such a general statement should not afterwards prejudice the plaintiff, by reason of any variance between the writ and declaration, unless the defendant could show by affidavit that he had been misled by the statement, and prevented from paying money into court so soon as he otherwise would have done; and that in such case the defendant should be allowed to pay money into court *nunc pro tunc*, and be placed in the same situation as to the costs, as if he had paid such money into court before the filing of the declaration.

"We also think that another collateral advantage of considerable importance may be obtained by means of the Writ of Summons; that is, by requiring that the plaintiff should, in all cases, by a note indorsed

upon such summons, give notice to the defendant, that on payment of a sum specified as the amount of the debt or damages claimed, with a further sum, being the expense then incurred in suing out a writ of summons, which sum should be indorsed by the deputy prothonotary on suing out the writ, the plaintiff would acknowledge satisfaction; but that in case such debt, damages and costs were not paid, the plaintiff would not be precluded from recovering to a larger amount.

"We think that such a notice would be beneficial, as it would, when the demand was just, enable the party sued to stay proceedings at the least possible cost, and even in many cases without incurring the expense of employing a professional adviser and agent for the purpose. But as a plaintiff might, in the hope of obtaining earlier satisfaction of his demand, be willing to take less than was really due, it would be unjust that he should be in any manner concluded or even prejudiced by the offer, if not accepted, in any subsequent stage of the proceedings. We also think it desirable that the writ of summons should give notice to the defendant, that if he made default by not appearing, the plaintiff would be at liberty to enter an appearance for him, and proceed to judgment and execution without further notice.

"In order to afford the defendant an opportunity of settling the action at the earliest opportunity and at the least expense, we recommend that a defendant should, in all actions for debt or liquidated damages, be entitled immediately after the service of process, to a rule as of course for the payment into court of such a sum as he thought proper, as the debt owing, together with the costs then incurred, and indorsed on the process; and that in case the plaintiff refused to accept that sum in satisfaction, and did not on the trial prove a larger sum to be due, the plaintiff should be nonsuited, or the defendant should be entitled to the verdict. In support of this suggestion, we cannot do better than use the language of professional gentlemen of great experience by whom it was made. This 'would enable 'the defendant to settle the action by payment only of a reasonable and 'proper sum for costs, and would prevent any imposition by the plaintiff's attorney (or the person entrusted with the process) of a greater 'charge for costs than he was entitled to, which defendants are often 'obliged to submit to pay, rather than resort to the present course of 'staying proceedings by summons and order before a judge, at the expense of at least three pounds; this practice has been acted upon 'in the county court of the sheriff of Lancashire, for some years, 'with great advantage, and for any thing that appears to us, would be 'proper for all courts."* An acceptance of the sum so paid into court, and costs, would frequently save the expense of filing bail or entering an appearance. We think it probable that the same rule might be advantageously extended to actions for unliquidated damages; on this point, however, it would be desirable that the practice of the County Palatine Court should be assimilated to that of his Majesty's Courts at Westminster."—pp. 9, 10.

Had Lord Tenterden, in his "Uniformity of Process" act, in-

* "See Suggestions from the Attornies at Preston, Appendix to the First Report of his Majesty's Common Law Commissioners, 329."

troduced these improvements, it would have formed a measure of incalculable advantage to the public. But thus it is—a measure which, if it had proceeded from the hands of the Common Law Commissioners would probably have carried into effect the valuable changes above suggested, is adopted by the Chief Justice of the King's Bench, and pared down to suit his own opinions.

The whole of the Report is, in substance, a strong argument in favour of provincial courts, and those too not of a limited character, but with a very ample jurisdiction. What is the reason that justice is administered both more cheaply and more expeditiously in Lancashire than in other counties? Because all the proceedings are not transacted in London—because there are offices within the county whence the writs issue, and where the general business of a suit is carried on. So should it be in every county of England.

The system of appeal from the Court of Common Pleas at Lancaster, is pronounced by the Commissioners to be "objectionable in point of theory, and in practice highly unsatisfactory," which might, indeed, have been expected, since it seldom happens that matters which are objectionable in theory are highly satisfactory in practice. The following are the observations on this head:

"Another, and, as we conceive, the principal objection to the present system of administering justice in the superior common law court of the County Palatine, is founded, not upon any defect as to jurisdiction, but on the want of a sufficient number of judges to constitute an unobjectionable Court of Appeal, particularly on motions for new trials, or the discussion of special cases made for the opinion of the judges, and the want of a court in the metropolis. The ordinary course is, to appoint two only of the judges of his Majesty's common law courts at Westminster, under a commission every half year, to be judges of his Majesty's Courts at Lancaster. The necessary consequence is, that a litigant party, desirous of appealing from the decision of the judge who tries the cause, has not, except in case of a special verdict, any opportunity for such appeal, except to two judges, one of whom has tried the cause, and from whose decision an appeal is not unfrequently made. Such an appeal, objectionable in point of theory, is, in practice, highly unsatisfactory; and the inconvenience is still further increased by the uncertainty of the place and time of the meeting of the judges in London, and of procuring the attendance of counsel at times most convenient to the judges. It appears to us that these disadvantages may be removed, by the simple expedient of appointing the barons of his Majesty's Court of Exchequer to be judges of his Majesty's Court of Common Pleas at Lancaster, under a more permanent commission, in addition to the half-yearly appointment of the judges of assizes; the judges of assizes still sitting at the assizes *in banco*, for the purpose of disposing of motions made there. Such an arrangement would, we apprehend, remove the chief objection

which at present exists, and which excludes many important causes from the County Palatine jurisdiction. But in order to prevent motions for new trials from being made for the mere purpose of delay, we recommend that it should be, as heretofore, discretionary with the judges of the County Palatine who attend the assizes, to grant or refuse a suspension of the judgment, on application made as heretofore to them; and that in case no rule *Nisi* should be obtained, either from the judge at the assizes, or within the time permitted by him for such a motion, none should be allowed, unless the party applying for the same should give sufficient security for the final damages and costs, to be approved by the prothonotary; but that, in case of such security given, he should be entitled to make such motion before his Majesty's Barons of the Exchequer, as of right, within the same time, and in the same manner, as if the cause had been tried by virtue of a *Mittimus* from that court.

"The reasons which prevail with us for recommending that the barons of his Majesty's Exchequer should be named as judges of the County Palatine in a permanent commission, rather than the judges of the Court of King's Bench, or Common Pleas, are chiefly, that the present state of the business in that court leaves it more open to any accession of business, and that the Court of Exchequer seems, from its general constitution, the most proper to exercise a jurisdiction where any question regarding his Majesty's property may arise; but it would obviously answer the same purpose, with regard to the suitors, if it should at any time be his Majesty's pleasure to place the judges of either of the other courts in such a commission. But for the purpose of preventing any further expense by this arrangement to the suitors, we would recommend that, upon any of those motions or arguments before the barons in the Court of Exchequer which now take place before the two judges of the County Palatine (and we presume they would, for their own convenience, make the Court of Exchequer the place of business for the County Palatine during the term), notice should be given to the clerk of one of the judges of assize, who should attend and draw up the rule or order of the court, in the same manner as is now done at the Judges Chambers, unless it should happen, upon any modification to be made in the practice of the Court of Exchequer, that the officer then attending would be content to do the business, and transmit the order to the prothonotary of the County Palatine, upon terms as reasonable as the present."—pp. 13, 14.

Here then we have another proof of the wretched state of our law with regard to all appellate jurisdictions—no rule—no system—no reasonable arrangement. In this instance the Court of Exchequer is named—and for what reasons? 1st, "because the present state of the business of that court leaves it more open to any accession of business;" and 2dly, "because it is the most proper to exercise a jurisdiction where any question regarding his majesty's revenue may arise." With respect to the state of business in that court, it now bids fair to rival the King's Bench; and why any question about his majesty's property should influence the

appeal from the Common Pleas at Lancaster, we are at a loss to understand. However, it is well that the Commissioners have not recommended an appeal to the Chancellor, or to the Privy Council. Until a real Court of Appeal is established, these difficulties will be always arising.

The question of removing the assizes from Lancaster is entered into at some length by the Commissioners. It is almost inconceivable that men should have submitted so long to be dragged from their homes to a remote part of the county, to appear there as parties, as witnesses or as jurors, when no reason whatever exists for not holding the assizes in the populous districts whence seven-eighths of the business proceeds. But we suppose the long existence of the institution, has been a cogent reason for its continuance. This argument, however, has not prevented the Commissioners from recommending a change, and they seem to suggest the propriety of holding the assizes at *Preston*, as the most central situation. Should this suggestion be carried into effect the error would be a most grievous one. The expense of maintaining witnesses, from their own homes, which is the substantial outlay in a cause, would still be incurred in every case brought from the populous towns of Liverpool and Manchester. Preston is upwards of thirty miles distant from both these places, and therefore, in order to procure the attendance of a witness, a journey of sixty miles must be made. Now, it is obvious, considering the mode in which business at Nisi Prius is conducted, that no party could be safe without summoning his witnesses at least a day or two before his cause may be expected to come on, and thus the evil of calling the witnesses from their homes, which a removal of the assizes should prevent, would still be incurred. The jurymen, likewise, are generally resident in Liverpool or Manchester, or in the neighbourhood of those towns, and no advantage would be gained by them but the saving of twenty miles travelling. Why should not the assizes be held by adjournment both at Liverpool and Manchester? a change which would diminish the expense, both of suits and of prosecutions, at least one half! To deny this to the inhabitants of those great and increasing towns, will be an act of the most gross injustice.

We are happy to be able to cite the following passage from this portion of the Report in favour of cheap law:—

"It has been suggested, that to diminish the present expenses of suits by an alteration in the place of holding the Assizes, would be to encourage litigation to an inconvenient extent. With the greatest deference, however, to the judgment of those by whom this objection has been advanced, we think that such apprehensions are not well founded, and that, if it were necessary to restrain an inordinate spirit of litigation, the object

ought to be attained by very different means. We think that the expense, trouble, and uncertainty, which are necessarily incident to litigation, furnish a sufficient protection against any excessive and dangerous increase. We apprehend that legal process is much more likely to be converted into the successful instrument of vexation and oppression, in the hands of a malicious and litigious plaintiff, where the proceedings are costly and expensive, than where they are reasonable and moderate. To make law suits dear, in order to diminish their number, would not only be to incur the danger of making justice inaccessible to many, but would be wholly inconsistent with the policy lately manifested by the Legislature, in reducing the expenses of suits by the repeal of all stamp duties on law proceedings. We may observe, also, that the objection is practically refuted by experience, when it is considered that no inconvenience results in London and Westminster from cheapness of litigation, where little expense is incurred in procuring the attendance of witnesses on the trial of causes of action which arise there.

"We conceive that were it even politic and just to make law proceedings costly in order to repress litigation, yet that the obliging parties to resort to a distant tribunal would be one of the most inconvenient and objectionable means of effecting that object, because the burden in that case is felt in a high degree, not merely by the parties to a suit, but by jurors and witnesses, who surely ought not to be put to expense and inconvenience for the sake of restraining a litigious spirit in others. We think it probable that the remoteness from the assize town, from the southern and populous parts of the county, greatly diminishes the number of causes tried. It would be difficult, without resorting to this consideration, to account for the great disproportion between the number of causes entered for trial for the sittings in London and Westminster and of those that are entered for trial at Lancaster; the former exceed the latter in the proportion of about twelve to one. This is a disproportion which cannot well be accounted for, after making every reasonable allowance for the difference of population, commercial importance, and the number of country causes tried at Guildhall or Westminster, without also taking into account the facility and cheapness of trial in cases where the cause of action arises in London or Middlesex. Were the sittings for Middlesex and London to be transferred to Cambridge and Oxford, so as to impose the same degree of inconvenience in point of distance on London and Middlesex, to which Manchester and Liverpool are at present subject, it cannot be doubted that the present disproportion would be much diminished."—p. 19.

Art. VIII.—SHORT REVIEWS OF BOOKS.

1. *What is Special Pleading? A Letter to Sir Thomas Denman, Chief Justice of all England, &c. &c. &c. in Answer to this Question: with a Proposal of Emendations in the Forms of Actions.* By William Theobald, Esq. of the Inner Temple. 8vo. London.

The object of Mr. Theobald in the publication of this little tract, is to remove the erroneous opinions existing in the minds of many persons, with regard to the nature and advantages of that system of legal procedure which has obtained the name of *special pleading*, and which, in consequence of abuses and corruptions, has become, in the estimation of the public, a sort of *opprobrium* to the law. In the earlier part of his letter he shows, with great distinctness of illustration, that when applied to its true uses, special pleading is merely a logical mode of arriving, with precision and clearness, at the question, whether it be one of law or of fact, in dispute between the parties.

This subject has been well treated by the Common Law Commissioners, and no person who has examined the various arguments carefully and dispassionately, will deny that few methods have been ever devised better adapted for stripping a dispute of every thing but the proper ingredients for judicial investigation than a simplified and well-directed system of special pleading. Not only is the attention of the judge called at once to the real point, but infinite delay and expense are avoided by the proof being confined to that which is really in issue. The evils of our present mode of proceeding arise from the abandonment or perversion of the true principles of pleading; and it is of the highest importance that the true source of those evils should be pointed out.

In their strictures upon the advantages of special pleading, the Commissioners appear to have considered the question chiefly with regard to the pleadings subsequent to the declaration, and have suggested, that in place of the *general issue*, or loose denial of the plaintiff's claim, which is now the usual answer to a demand, the defendant should be compelled to state in his plea the specific grounds of his defence. The mode in which the plaintiff's claim is stated, appears not to have been considered a matter of equal importance; and it is to this point that the greater part of Mr. Theobald's observations are directed.

"Having explained," he says, "the nature of the different pleadings, and suggested a substitute for the existing mode of enforcing due formality, the different forms of action next require to be considered. What is an action? A means of enforcing some right; a right to damages,

right to restitution, &c.; which supposes some other right infringed, and in the infraction of which originates this right of action. A form of action therefore, defined with reference to its object, is that peculiarity in each action which adapts it to the particular variety of right in question; and what can this peculiarity be, but a mere peculiarity of statement, showing that such a particular right, as distinguished from all other kinds, has been infringed upon; and to show this, it is obvious the real facts, and only real facts are necessary. Now, of the existing forms of action, only one or two accord with this essential idea of an action; the peculiarities of the others are fictions. To review them, take first the action of *indebitatus assumpsit*, a form applicable to a tradesman's common book debts, and therefore the most frequent kind of action. Suppose the demand to be for goods sold and delivered. The declaration states that on such a day the defendant was indebted to the plaintiff so much, for goods sold and delivered to the defendant at his request; and that being so indebted, in consideration thereof he promised the plaintiff to pay him the money mentioned; but that he had disregarded his promise, and had not paid the money, to the plaintiff's damage of so much. Now, a debt upon a sale, and its non-payment being alleged, the defendant is thereby shown to be under an obligation, for the enforcement of which the plaintiff is entitled to an action. Of what use then are the allegations that the defendant promised, that the sale was at his request, and that the non-payment was to the damage of the plaintiff? Of no real use; but they are essential, as the peculiarities of this form of action, and a special demurrer would lie for the omission of any of them. If it is said the law implies a promise; I ask of what use is the implication, except to justify the form which is the subject of objection. The object of the declaration is to show the defendant *primâ facie* under an obligation. The fiction of a promise, the fiction of a request, which are not necessary to constitute the obligation, ought not to be required in the declaration."

After some further illustrations, from the Actions of Trover and Detinue, Mr. Theobald proceeds—

"I have dwelt thus largely on the subject of the forms of action, for two reasons: first, that they afford the ground-work on which the opponents of special pleading raise their main battery for the demolition of the rest of the system; and I confess I would take the same position, if the existing forms were essential to the system; and secondly, in the hope of inducing your Lordship, to whom the public look up as a constant guardian, to request of his Majesty's Common Law Commissioners a reconsideration before they finally dismiss this subject. Their only remarks upon it are contained in a brief passage, beginning as a summary of the opinions of others, and ending with their own opinions; but which affords not a glimpse of the opinions, by no means peculiar to myself, advocated in this letter. To what other conclusion then can I come, but that these they have not considered. 'An opinion,' say they, 'is entertained by some persons, that all distinctions as to forms of action should be abolished.' Now, I am not of this opinion; nor do I think it practicable. I only propose to substitute for distinc-

tions which are wholly fictitious, distinctions which will correspond with the real differences in the causes of action:—'And that the plaintiff should be allowed to state the circumstances of his claim or complaint in ordinary language, free from all restraint of technical method.' Nor am I of this opinion, unless by 'technical method' is meant some method opposed to logical method, and indefensible with relation to the principles of sound reasoning. As for the 'whereas's,' 'heretofores,' and 'to wits,' they had much better give place to ordinary language, ordinary modes of expression. 'And there are others, who, without rejecting forms of action altogether, think that those which are now established should be resolved into more convenient and simpler divisions.' I am not sure that I understand the views of this class of persons. To a certain extent they seem to approve of the existing forms of action, but they propose to resolve them into different divisions. Is not this the class with whom opinions are mere matter of convenience and sentiment? Seeing a number of unprejudiced persons opposed to the existing forms, this is their compromise. They would, I suppose, disallow the choice which the plaintiff has at present in some cases between two or more forms, trespass and trover, case and assumpsit, trover and detinue, or debt and *indebitatus assumpsit*, and appropriate each form exclusively to a particular kind of wrongs. But probably they do not perceive, that to accomplish this, rights must be previously catalogued and classified; a task which would necessarily fail, for want of lawyers who are sufficient jurists, and jurists who are sufficient lawyers, to undertake it. Besides, the jurists would repudiate it, as laborious for a puerile object. 'We (the Commissioners) cannot, however, persuade ourselves that with respect to the forms now in common use, any considerable change would be expedient, with the exception only of the new shape which in our second Report we have proposed to give to the action of ejectment. It is not that we are insensible to certain imperfections and inconveniences incident to these forms, for we feel that their classification is arbitrary and otherwise defective. But in this, as in so many other cases, we are presented with a choice of difficulties. To those who have observed the inconveniences which in other systems of judicature are found to flow from the want of fixed forms of action, it will scarcely be doubtful that they are an invention of real merit and importance. They tend most materially to secure that certainty in the right of action itself, which is one of the chief objects of jurisprudence; they form a valuable check to vagueness and prolixity of statement; and in this and other respects they are essential to the convenient application of the rules of pleading, a system the great advantages of which we have elsewhere endeavoured to illustrate.'

"Some of the attributes which properly belong to special pleading are here ascribed, improperly, to the forms of action. The concluding remark, however, contains the real question. Are the existing forms essential to the convenient application of special pleading? They are, say the Commissioners; and the Commissioners therefore propose to retain them, excepting only one, with all their fictions. But do the learned Commissioners see the consequences of this opinion? It is an admission fatal to the system of special pleading. The opinion of the

public is irreconcilably opposed to the continuance of legal fictions. Be abolished they must: and with them will be abolished special pleading if it depends in any degree on fictions. But I contend that fictions are inconsistent with special pleading, and that their abolition is necessary for its perfection. Suppose the defendant, in virtue of ancient precedents, were allowed to answer the fictions of the declaration by some other fictions; or the plaintiff were allowed in his replication to answer the defendant's facts by new fictions. Would either the plea or the replication be consistent with the principles of special pleading? What then makes fictions in a declaration consistent with special pleading? If the declaration contained nothing but fictions, and the subsequent pleadings were special, it is manifest the effect of the fictions would only be to add one useless link to the length of the pleadings: and if the declaration consists not solely of fictions, the subsequent pleadings relate only to the facts and reject the fictions;—what then is the use of fictions? Of the different fictions of the different forms, the merit and importance of each must be about equal. The action of ejectment the Commissioners abolish on account of its fictions. Why then not eradicate the fictions from the other actions? Because, say they, the absence of fixed forms is found to occasion inconveniences in other judicatories. Yet in the next previous sentence our fixed forms,—that is, our fictions (for it is the fiction which fixes the form and makes it arbitrary,) are also charged as being attended with inconveniences. There are inconveniences without, and inconveniences with, fictions; therefore we will retain the fictions. Or, if the meaning is, that in some other judicatories inconveniences arise from the total want of forms, and in our own from the peculiarity of our forms, what ought to have been the practical conclusion? Surely, the amendment of our forms in the faulty part; the excision of the fictions.

"The Commissioners proceed; 'If forms of action then are to be retained, we think it better to adhere to those particular forms to which *we have been accustomed*, than to explore forms framed upon new principles.' Yes, practice makes perfect, and reconciles to that which has not the sanction of any avowable principle. But every year a new generation is rising unaccustomed to the old forms, and a new age is risen. Besides, the forms wanted are forms framed not on *new* principles, but on principle. 'Much confusion,' it is added, 'and uncertainty as to the right itself, would probably be generated by such a change; and so much of our course of pleading would also be unsettled by it, that in this point of view alone more would be lost than gained. In short, to innovate to any considerable extent upon this part of our juridical system would in our judgment be to disturb foundations, and to endanger the safety of the whole structure.' Now, to these remarks, coming from persons of great learning and experience, I am disposed to assent, as conclusive against any forms whatever framed on *new* principles. But it is obvious they bear no relation to any change governed by *established* principles; and even were they so intended, being merely general, their weight as against the reasons in support of any specific change not actually in the contemplation of the Commissioners, must be confessed to

be inconsiderable. On the opinion that fixed forms of action secure certainty in rights, I will only remark, that it well attests how complete in the legal profession is the divorce of law from jurisprudence. What follows the above remarks relates merely to the abolition of certain forms, now so rarely used as to be almost obsolete. And, in conclusion, the Commissioners say, 'We propose then to simplify the Law of Actions by discontinuing all those which are now maintainable between subject and subject, the following usual or well-known modes of remedy only excepted; viz., Covenant, Debt, Detinue, Dower, Ejectment (under its new form and denomination of Plea of Land), Mandamus, Prohibition, Quare Impedit, Replevin, Scire facias, Trespass, and Trespass on the Case (including Assumpsit and Trover).'

"To oppose a difficulty instead of an answer to the above remarks, there are some equally attached to the existing forms and fictions as the Common Law Commissioners, who would say, 'By abolishing fictions you contribute to disturb ancient foundations, and you offer no adequate forms in the place of them." I reply, Your phrase is unnecessarily alarming: you cry, Fire, fire, fire! without the appearance of a spark to justify it. If you come to me to reason and advise, I request you to drop all party watch-words. I disturb no foundations. What I propose is to strengthen foundations, by removing a heap of what time has converted into obnoxious rubbish. The inadequacy is not in my recommendation, but in your own power of conception. True indeed I offer no fixed forms, because it is obvious there are no fixed cases;—as many plaintiffs so many different cases;—but there are principles and rules applicable to all cases: and what I contend for is, that as they have been applied to some and that a majority of cases, they should be extended to all cases. The form of action should be an expression of the facts of the case; not the irrelevant facts as a party states them to his friend or attorney, or legal adviser; nor mere circumstances which are only evidentiary of the facts: but the facts such as by law are inductive of the right claimed by the plaintiff. Of such forms I have hinted examples, and some of the existing forms are drawn on this principle. For instance, the action of Covenant. The declaration stat s, that by a deed of such a date, made between the plaintiff and defendant, the defendant covenanted to pay the plaintiff such a sum of money on such a day; yet he had not paid it on the day appointed nor since. Or, by a deed of such a date, made between the plaintiff and defendant, the plaintiff demised certain premises to the defendant for such a term, and the defendant covenanted to keep them in repair during the term; yet he had not kept them in repair during the term, but on the contrary had suffered them to become dilapidated in such and such particulars. What more in a declaration can be required? What fictions are here necessary? The action on the case *ex delicto* also is a statement of the real case, or so much of it as is necessary to support the action. This action, therefore, and the action of covenant, though called different forms, differ only as the cases differ; and as forms must differ, unless indeed for every case we give some one fiction for the parties to toss up, and say they have a right, and then wager the facts and the law upon it."

2. CIVIL LAW MANUSCRIPTS.

Recherches sur plusieurs Collections inédites de Décrétales du Moyen Age. Par Augustin Theiner, Docteur en Droit, &c. Paris. 8vo. 1832.

New proofs are daily produced, that imperfections in existing laws may be easily lessened by careful researches into existing materials, by means of which their texts may be corrected. Upon the Continent such researches are beginning to assume an organized character, although until lately the burthen of making them has been too much left to the activity of private individuals. The *School of the Charters* now established in Paris, and the revival of the Fifth Class of the Institute, are circumstances highly favourable to extensive and accurate inquiries into the foundations of law. It begins to be felt, that a knowledge of the past is not useless towards a due improvement of existing institutions; and deep learning and enlightened industry are found by lovers of free government in modern times, as by the Miltons and Seldens and Hampdens of the seventeenth century, to be perfectly compatible with sound, popular opinions. It will depend upon the direction to be soon given by *Parliament* to the labours of the Record Commission, whether Great Britain shall share largely in this improved spirit.

Of the private individuals devoted to inquiries into manuscripts, few have been more successful than Professor Haenel, of Berlin; and Dr. Theiner, of Breslau.

Professor Haenel's Catalogue of Manuscripts in different parts of Europe, published in 1830, included for England only those in the very important collection of Sir Thomas Phillips, of Middlehill. The Record Commission could not do better for several years to come than to complete the Professor's labours. To collect into one spot in London the *Catalogue* of all the masses of public manuscripts, and to verify those catalogues well, would require much care. The owners of private manuscripts on subjects interesting to the public, would doubtless contribute largely to such a collection.

Dr. Theiner's Researches, dedicated to Savigny, are of a more recent date. They treat of the author's discovery at Brussels, Bruges, and London of various canon law manuscripts of the 11th, 12th, and 13th centuries.

The success of Dr. Theiner in London seems to illustrate a curious and important point in church history. A collection of decretals by Bernard of Compostella had been rejected by Pope Innocent III., because it contained, as authorities, what had not received the papal sanction. Bernard seemed to diminish the

supremacy of the Bishop of Rome, and therefore the Pope took pains to supersede him by causing a new collection to be introduced into the Great Law University of Bologna. The old lawyers, however, placed much reliance on the works of Bernard; and in after times Cujas, the Pithous, Baluzius, and others, made laborious inquiries after carly and authentic copies of it. They examined all the libraries in France for this purpose, but without success. Equally fruitless were the researches of Antoine Augustin for it in Spain, the country of the author. Dr. Theiner has been more fortunate; and as the result of his visit to *England* for the sake of the stores which remain hidden here may excite just attention to those stores on the part of their keepers, we give his modest account of his visit in his own words:

"Ce problème historique paraissait donc devoir rester sans solution. Cependant la lecture d'un catalogue d'une Bibliothèque d'Angleterre, dite Jacobéenne, me fit soupçonner que le manuscrit de cette Bibliothèque, intitulé: *Innocentii III. Decretalium Breviarum per Bernardum Compostellanum*, pourrait bien être l'ouvrage que l'on croyait à jamais perdu.*

"Pendant mon séjour à Londres, je fus assez heureux pour trouver dans la Bibliothèque royale du Muséum britannique un manuscrit contenant la véritable collection de Bernard de Compostelle.† Ce manuscrit, côté 9 B. XI., est sans aucun doute celui de la Bibliothèque Jacobéenne, qui se trouve depuis long-temps réunie à la Bibliothèque royale du Muséum britannique.‡

"Le catalogue de cette dernière Bibliothèque ne le désigne que sous le titre de: *Innocentii III. Decretales*, ce qui m'obligea de compulser toutes les collections de décrétales avant de le trouver.

"Il date du commencement du quatorzième siècle, et est écrit sur parchemin avec assez peu de soins."—*Recherches, &c.* pp. 49—51.

To this notice of manuscripts in England which more especially concerns foreign jurists than ourselves, but in the interest of which Doctors' Commons has a share, we may add, that in the extensive work of M. Dupin upon the profession of Advocates, the solution of a question of some importance is stated to depend on a manuscript *once existing at Oxford.*

It is high time that the members of the great republic of letters, scattered all over the world, should make common cause, and devise means for rendering access easy to this glorious common stock.

"* Bernard: Catalogi MSS. Angliæ et Hiberniæ, Oxoniæ, 1697, fol. t. ii. p. 1, p. 245."

"† A Catalogue of the Manuscripts of the King's Library, by David Casley, London, 1754, p. 170, in 4to.

"‡ An Account of several Libraries, public and private, in and about London, for the satisfaction of the curious, whether natives or foreigners (in Harleian MSS. 5900). In the Gentleman's Magazine, year 1816, Sept. p. 213-226, et Oct. p. 317-319. Synopsis of the Contents of the British Museum. London, 1826, 8vo. p. 86, and sq."

3. THE LAW OF STRANGERS IN FRANCE.

Code des Etrangers, ou Traité de la Législation Française concernant les Etrangers. Par B. J. Légat. Paris. 8vo. 1832.

STRANGERS are peculiarly objects of jealousy to the inhabitants of half-civilized states; and it is a just reproach to France, that her laws were long severe, in the highest degree, against them. They who visited the country were subjected to numerous vexations in person and property. When they died there, religious rites were refused to their remains, if they were Protestants; and, in no case, could their property be transmitted either by will, or to their relations. All they might leave was seized by the King under the *droit d'aubaine*, a right which the eighteenth century had derived from the enlightened days of Charlemagne and Louis le Debonnaire. In 1790, the constituent assembly introduced a more humane system, which was afterwards swept away with a thousand other good works done by the great men of the first period of the revolution; and Napoleon did not sufficiently revive it, when completing the Codes projected by the constituent assembly. The debates upon them contain, indeed, curious proofs of the existence of prejudices, which the despot fostered in favour of France only, in order that Frenchmen might become more exclusively instruments of his gigantic ambition. In 1819, the *droit d'aubaine* was abandoned; and the revolution of 1830 seems to have drawn attention satisfactorily to the general subject.

An old barbarous rule, however, like that which in the Turkish law,* directs contracts made by foreigners out of Turkey not to be tried in the Mahommedan courts, is still in force in France. A recent writer, the title of whose work is prefixed to this paper, appeals against it in the following terms, which, at least, prove that codification has not yet performed its task perfectly in France:—

"Mais lorsque les etrangers, tant le demandeur que le defendeur, n'ont point leur domicile en France, nos tribunaux sont-ils competent pour statuer sur leurs contestation. La jurisprudence est divisée sur ce point; ou, pour mieux dire, il n'y a pas de jurisprudence; car nos cours et tribunaux ne parlant point d'un principe certain, se declarent quelquefois competens, et d'autres fois refusent de juger."

* "Aucun differend entre deux étrangers sur des engagemens contractés hors de l'empire, ne peut être jugé en pays Mussulman."—*Notice sur la législation Othomane, Themis*, vol. iii. p. 316.

The Turkish law is consistent upon this subject; and extends this rule to contracts between *Mussulmen* and strangers, whereas the French courts admit such suits between *Frenchmen* and strangers.

It is difficult, nevertheless, to find words clearer than those of the 11th, 13th, 14th, and 15th articles of the Code Civil, under which some of the French courts pronounced the decisions which occasioned these observations of Monsieur Légat. The translation of these articles is as follows:—

"Article 11. A foreigner shall, in France, be invested with the same civil capacities as are, or shall be granted by the treaties of their nation to Frenchmen in their country. 13th. A foreigner licensed by the king to become domiciled in France, shall be invested with all civil capacities so long as he shall reside there. 14. A foreigner, even if not a resident in France, may be summoned to appear in the French courts upon obligations incurred by him in France, in favour of a Frenchman. He may also be sued in the French courts, upon obligations incurred by him abroad in favour of a Frenchman. And, 15th. A Frenchman may be sued in a French court upon obligations incurred by him abroad even in favour of a foreigner."

Upon these plain enactments we find the following recent decisions, from which it is not rash to infer, that much more is needed in order to make men observe law, than to set it forth in an intelligible code. That is an indispensable step, but the code must be consistent with advancing civilization, or it will be daily infringed. Private engagements will be formed in reference to opinions opposed to the letter of the law; and judges will be found, from time to time, to yield to such opinions, which they themselves share; and, in spite of duty, to neglect the laws which they disapprove. From this conflict must inevitably arise doubts and litigations, which it is the true mission of codes to remove.

The decisions referred to are as follows;—

In December, 1827, the Civil Court at Boulogne admit jurisdiction.

In January, 1828, in the same case, the Tribunal of Commerce at Calais reject the jurisdiction claimed for it; and, in the same year, the Supreme Court in Paris supports the decision of the Tribunal of Commerce at Calais.

Again, in 1832, it is decided by one court, that the *French* indorsee of an English bill of exchange may recover upon the bill against the English drawer whom this French indorsee happens to find in France.

But in the same year, 1832, another court decides a jurisdiction case directly the other way.

Whilst a third court of high rank, in a third case of a like kind, upon an English bill of exchange, also gives judgment in favour of the indorsee.

Again in the same year, 1832, the Supreme Court of Appeal supports the jurisdiction of the French Courts in a *mercantile* case, although the contract was clearly made between two foreigners in

their own country; but it steadily rejects jurisdiction in the case of indorsed foreign bills of exchange, which cannot be denied to be more especially commercial and ambulatory instruments than any other form of contract that can be devised.

The law which leads to this confusion cannot be settled upon right foundations; and the present state of intercourse between different countries calls for a change. To cut off a place of refuge from their political exile would ill accord with the best feelings of the present day; and, it is probable, that the barbarous legislation still existing in France (against the letter of other articles of the code) which subjects foreigners, even of the political class, to the *haute police*, will soon be improved. A *projet de loi* has been recently prepared on the subject. But the change required applies to emigrants of a very different description. It may appear, as far as relates to the above extracted articles, to be a merely civil change; but it is connected with considerations of criminal police. The vastly greater proportion of criminals in France of foreign birth, compared with those of French origin, renders it probable that facility of escape from the scene of former misconduct does not promote future good behaviour. It is not to be expected that he who erred when supported by the safeguard of family connections, or friendly and watchful neighbours, should amend upon reaching a spot in which, in addition to impunity for the past, he suddenly enjoys the means of new profligacy and freedom from personal remark.

Wise international laws would check evils, which are increased under the existing code and treaties. The difficulties of obtaining justice against the distant debtor, or the fugitive delinquent, are sufficiently numerous under any system of legislation; and governments are especially bound over to afford facilities of redress to those who, in such cases, suffer injustice under circumstances of increased distress.

Art. IX.—PARLIAMENTARY PAPERS, INTELLIGENCE, &c.

Report of the Committee of the General Penitentiary at Milbank, for the reception of Convicts; made in pursuance of the 56th Geo. III. c. 63, s. 39;—specifying, the State of the Building; the Behaviour and Conduct of the respective Officers; the Treatment and Condition of the Prisoners; the Amount of their Earnings, and the Expenses of the Establishment, during the year 1831.

The Building is in a sound and substantial state. In the course of the last year no repair beyond what must unavoidably be required in so extensive a structure has been incurred, and no new erection made.

The number of Convicts in the Penitentiary on the 31st of December 1830, amounted to 566; viz. 405 males, and 161 females. And on the 31st of December last the number was 538, being 394 males, and 144 females:—having been diminished during the year by the deaths of 5 males and 5 females, the discharge of 152 males and 50 females (of whom 135 males and 49 females were by free pardon, including 6 males and 9 females upon medical grounds, as represented to the Secretary of State for the Home Department); 3 males were sent to the Hulks, one of whom for recovery of health, and 1 female was sent to Bethlehem Hospital, being insane:—and augmented by the reception of 149 males and 39 females.

Of those who died in the Penitentiary last year, 1 man and 2 women were in bad health when received; and of those recommended for pardon on medical grounds, 1 man and four women were in an unhealthy state when admitted into the Institution.

The number at present within the walls is 576, being 435 males and 141 females.

The health of the prisoners throughout the year has been remarkably good; to which, in the opinion of the Medical Officers, the change of diet mentioned in their last Report has materially contributed. Up to the present period the Institution has continued free from any prevailing disease; and with the exception of two cases of fever, the prisoners now in the infirmaries are generally convalescent.

The Committee have ordered every precautionary measure to be adopted and carried into execution with a view to guard against the approach of cholera, consistently with the safety of the prisoners and the rules of the establishment; and it is satisfactory to the Committee that, in the opinion of their Medical Adviser, the construction of the prison and the means which its regulations and discipline afford of excluding in a great degree external intercourse, and separating the prisoners from each other within, give the strongest reason to hope that any infection will be wholly avoided, or, if by any unforeseen circumstance introduced, will be immediately checked in its progress.

In addition to the number of prisoners discharged in the year 1829, who had received gratuities for good conduct, as stated in the last Report, being 35 males and 12 females, 3 males have since applied, whose conduct from the time of their discharge having been found deserving, received the usual reward.

Of the prisoners discharged in the year 1830, being 170 males and 32 females, 68 males and 14 females have received gratuities for their good conduct since their liberation; 2 males and 2 females have died; 5 males and 2 females are known to be going on well, although they have not applied for gratuities; 4 males and 1 female have applied for gratuities, apparently doing well, but their testimonials were not considered such as to warrant the Committee in granting the customary reward; the claims of 4 males and 1 female have been rejected; 10 males and 1 female have been again convicted; and 77 males and 12 females are doubtful, inasmuch as their situations and conduct have not been satisfactorily ascertained.

In the early part of the last year an attempt at escape, attended by

robbery, was made by two prisoners, which was detected by the watchfulness of the patrol on duty. A prosecution was instituted by direction of the Committee against the offenders, one of whom was convicted at the Old Bailey Sessions, and sentenced to transportation for life, which sentence was carried into effect.

It is due to the Governor and Chaplain to remark the zeal and ability with which they continue to discharge the important duties of thei. respective stations; and it has been particularly satisfactory to the Committee to observe, in the examination of the schools, the continued improvement of the prisoners in religious knowledge and acquaintance with the Scriptures, which cannot fail, it is hoped, to have an influence on their future conduct when the time arrives at which they shall leave the Penitentiary.

A statement of the earnings of the prisoners, and an account of the expense of the establishment, during the year 1831, are subjoined to this Report.

The net amount of expenses for the year 1831, is diminished from that of the preceding year in the sum of 1926*l.* 2*s.* 7*d.*

BEXLEY, *Chairman.*

General Penitentiary,
8th March 1832.

Statement of Prisoners received into and discharged from the Penitentiary in 1831.

	Males.		*Females.*	
On the 31st of December 1830, there remained,	405		161	
In the year 1831, there have been received,	149		39	
		554		200
Died,	4		5	
Committed suicide,	1			
Sent to the Hulks for recovery of health,	1			
——— as incorrigible,	1			
Convicted on prosecution by Committee, and transported,	1			
Sent to Bethlehem Hospital,	–		1	
Discharged by pardon,	129		40	
——— on medical grounds,	6		9	
——— on expiration of imprisonment,	17		1	
		160		56
Remaining in Penitentiary at 31st December 1831,		394		144
	Total,			538

Prisoners' Earnings, from 1st January to 31st December, 1831.

EARNINGS BY MANUFACTURES.

	£.	s.	d.	£.	s.	d.
By Male Prisoners	2,298	6	6			
By Female Prisoners	259	19	0			
				2,594	5	6

EARNINGS BY WAGES,
In the General Service of the Establishment.

By Male Prisoners, as Wardsmen, Cooks, and Bakers	318	2	0			
By Female Prisoners, as Wardswomen, Laundrywomen, and Cooks	444	7	6			
				762	9	6
Total Earnings				£3,356	15	0

DIVISION.

Of which,									
	£.	s.	d.	£.	s.	d.	£.	s.	d.
One-Eighth to Officers	324	5	9						
One-Eighth to Prisoners	324	5	8						
				648	11	5			
Six-Eighths Profit to the Establishment				1,945	14	1			
							2,594	5	6
Of which,									
One-Fourth to Prisoners				190	12	4			
Three-Fourths to the Establishment				571	17	2			
							762	9	6
							£3,356	15	0

SUMMARY.

	£. s. d.	£. s. d.
To prisoners' per centage—		
One-eighth on manufactures as above £324 5 8		
Two-eighths on general service ditto 190 12 4		
	514 18 0	
To officers' per centage—		
One-eighth on manufactures as above	324 5 9	
		839 3 9
To profit to the establishment—		
Six-eighths on manufactures as above	1,945 14 1	
Sixth eighths on general service ditto	571 17 2	
		2,517 11 3
Total, as above.....	£	3,356 15 0

EXPENSE.

	£. s. d.	£. s. d.
To the Total Amount of Expense incurred between the 1st of January and the 31st of December, 1831, including the necessary repairs on the building, and the sum of £762 9s. 6d. calculated for wages to prisoners employed in the general service of the establishment	18,287 9 0	
Deduct three-fourths of £762 9s. 6d. calculated for prisoners' wages, they being paid only one-fourth thereof, and the whole amount of such wages being included in the above sum of £18,287 9s.	571 17 2	
Gross Expense	£	17,715 11 10
By three-fourths of Prisoners' Earnings employed in manufactures, estimated at the usual rate £. s. d. 1,945 14 1		
Profit on articles manufactured, above the cost 55 16 1		
	2,001 10 2	
Deduct Master Manufacturer's salary	200 0 0	
		1,801 10 2
Net Expense	£	15,914 1 8

To which add the Amount of Articles supplied by his Majesty's Stationary Office, forming an item in the accounts of that department, of which no bill has yet been received from that office for the last year.

N.B. The sum of £15,914 1s. 8d. is confined to the Expense of the Prison, and does not include the stock of goods and debts of the Manufacturing Department of the Prison.

Bexley, Chairman.

Robert Auld, Secretary and Accountant.

CRIMINAL STATISTICS OF FRANCE.

In our last volume we gave an account of the Report made to the King relative to the administration of civil justice in France. We shall now lay before our readers the substance of the Report on the Criminal Law for the year 1830,—a highly interesting document, conveying a much more accurate idea of the state of crime than our own Parliamentary or Government returns.

In 1830, the *Cours d'Assises* have tried 5,068 cases (6,962 prisoners), in which the parties pleaded not guilty, and 654 (787 prisoners) *par contumace.*

This exhibits a decrease since 1829 of 451 cases, and 388 prisoners.

Of the 5,068 cases 3,910 were offences against property, and 1,158 offences against persons. The proportion of the latter crime is gradually decreasing.

The proportion of accused criminals in all France was, in 1829, one in 4,321; in 1830, one in 4576. The department of the Ain exhibits the smallest sum of crime, having only one in 17,081; while the department of the Seine, the numbers are one in 1,260.

Of 6,962, 5,608 were men and 1,354 women, being in the proportion of 19 in 100. In crimes against the person, women are in the proportion of 15 in 100; in other crimes, 21.

Out of the number above mentioned only 114 are under 16 years. There is a gradual diminution in the number of juvenile offenders.

With regard to education, 4,319 were unable either to read or write; 1,826 had been taught to read and write imperfectly; and 688 well; while 129 had received a superior education. About 61 in 100 could not read.

Crimes against property were in the proportion of 63 in 100; crimes against persons in the proportion of 59.

The Report then gives a statement of the different professions and occupations of the accused, which is too long to be extracted.

Of 6,962 persons accused, 2,832 were acquitted and 4,130 convicted. Of these the punishments were as follows:—

To death	92
To hard labour for life	268
To hard labour for time	973
To imprisonment	1,005
To the pillory	8
To civil degradation	1
To correctional penalties	1,740
Youths under 16, detained for correction	43
	4,130

In capital convictions there is an increase of 3 on the last year, but a considerable diminution with regard to the three previous years.

The second part of the Report contains an account of the labours of the Correctional Tribunals, before which there were brought in 1830 139,035 cases (210,691 defendants), being an increase on the preceding year of 21,176 cases (34,464 defendants.) This increase arises from

the multiplication of offenders against the game laws, which has been caused by various circumstances in 1830. Ordinary misdemeanours, on the contrary, have sensibly diminished. Of those accused of misdemeanours 32,970 have been acquitted, and 177,721 convicted and punished as follows:—

To imprisonment for one year, or more . .	5,925
——————— for less than one year . .	20,385
To make amends	151,167
Offenders against the game laws	4
Youths under 16, detained with the view of correction	240
	177,721

4,822 of the correctional sentences have been appealed against; 2,685 confirmed; 2,137 declared void, in whole or in part; of 1,156 defendants the sentence has been increased, while 1,768 have been either acquitted, or have procured a commutation of their sentences.

The statements in the Report respecting second offenders are curious. The proportion of these has been increasing.

In 1826 they were	756
— 1827	893
— 1828	1,182
— 1829	1,334
— 1830	1,370

Of the latter number 1,014 had been once before convicted; 240 twice; 80 three times; 20 four times; 8 five times; 3 six times; 2 seven times; and 2 nine times; while one had actually been subjected *one hundred and fifty times* to correctional punishments. Of the 1,370 second offenders, in 1830, 197 were prosecuted for offences against the person, and 1090 for theft; of the latter 942 had been formerly convicted of theft. The proportion of second offenders in the prison at Brest is 34 in 100; in Toulon, 32; in Rochefort, 31; and in Lorient, only 16. The Report contains some highly valuable tables respecting second offenders. "These," says the Minister of Justice, "will furnish the means of modifying the discipline of our prisons, one of the principal objects of which ought to be the reformation of the prisoners."

The tables also contain accounts of the proceedings in matters of Police, and much other interesting information, which our limits will not permit us to detail.

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